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No. 10- 10-715

IN THE

Supreme Court of the United States

THOMAS LESLIE, LAURINE SPIVEY-FERGUSON, and GRACE GARCIA,

Petitioners,

v.

CARNIVAL CORPORATION

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL FOR THE THIRD DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by this case are:

1. Whether U.S. maritime law permits cruise lines to compel their passengers to sue them only in federal court in contravention of the Saving To Suitors Clause?

2. Whether a federal forum clause in a marine passenger ticket, which bars access to state court and *sub silentio* waives the right of non-diversity suitors to a jury trial, passes the "reasonableness" test for maritime adhesion contracts enunciated in *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S.Ct. 1522 (1991)?

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PETITION FOR A WRIT OF CERTIORARI

Cruise passenger-suitors Thomas Leslie, Laurine Spivey-Ferguson, and Grace Garcia petition for a writ of certiorari to review a decision of the Florida Third District Court of Appeal on two issues of federal maritime law.

The first issue is whether the enforceability of a federal court-only forum clause in a marine passenger ticket contract of adhesion is to be determined solely by whether the clause is "reasonable" *as between the parties*, without regard to its violation of the 221 year old federal Saving To Suitors Clause, which confers upon maritime common law suitors the right to initiate and maintain *in personam* suits in state court (especially when necessary to secure a jury trial on demand), and 46 U.S.C. § 183c(a) (1936)[recodified and renumbered in 2006 as 46 U.S.C. § 30509] – a maritime non-waiver statute which forbids vessel operators from inserting limitations on liability and court access in marine passenger tickets.

The second issue is whether Respondent's new federal forum clause passes the "reasonableness test" enunciated for marine contracts of adhesion in *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S.Ct. 1522 (1991).

OPINIONS BELOW

The orders of the relevant Florida state trial courts, dismissing Petitioners' state circuit court negligence actions against Respondent for lack of jurisdiction based

upon Respondent's new federal forum clause, are not reported.

The panel opinion of Florida's Third District Court of Appeal ("*Leslie I*") is reported at *Leslie, et al. v. Carnival Corp.*, 22 So.3d 561, 2008 A.M.C. 380 (Fla. App. 3 Dist. 2008).

The *en banc* opinion of Florida's Third District Court of Appeal ("*Leslie II*") is reported at *Leslie, et al. v. Carnival Corp.*, 22 So.3d 567, 2010 A.M.C. 263 (Fla. App. 3 Dist. 2009).

The Florida appellate court's *per curiam* affirmance and certified question in Petitioner Spivey-Ferguson's appeal is reported at *Spivey-Ferguson v. Carnival Corp.*, 22 So.3d 566 (Fla. App. 3 Dist. 2009).

The Florida appellate court's *per curiam* affirmance in Petitioner Garcia's appeal is reported at *Garcia v. Carnival Corp.*, 22 So.3d 567 (Fla. App. 3 Dist. 2009).

The August 30, 2010 decision of the Florida Supreme Court declining to exercise discretionary jurisdiction is reported at *Leslie v. Carnival Corp.*, 44 So.3d 1178 (Fla., Aug. 30, 2010).

STATEMENT OF JURISDICTION

On August 30, 2010, the Florida Supreme Court denied Petitioners' timely filed petitions for discretionary review of the relevant decisions of the Third District Court of Appeal of Florida above. See *Leslie v. Carnival Corp.*, 44 So.3d 1178 (Fla., Aug. 30, 2010).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1333(1) Admiralty, maritime, and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.* (emphasis added)

46 U.S.C. § 183c(a) (1936)

> It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such

loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect.

46 U.S.C. § 30509 (2006) (recodifying 46 U.S.C. § 183c(a), *supra*)

(a) Prohibition.—

(1) In general.—

The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting

(A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owners employees or agents; or

(B) the right of a claimant for personal injury or death to a trial by court of competent jurisdiction.

(2) Voidness.—

A provision described in paragraph (1) is void.

Art. I, Sect. 22, Fla. Const.

Trial by jury. – The right of trial by jury shall be secure to all and remain inviolate.

STATEMENT OF THE CASE

Petitioners are all cruise passengers who between 2004-05 were injured on separate cruises on vessels of Respondent Carnival, a Panamanian corporation based in Miami, Florida.

Petitioners' voyages all began and/or ended in the United States.

Petitioners each filed separate maritime common law negligence suits and jury demands against Respondent *in personam* in state circuit court in Miami, Florida. For various reasons, *e.g.*, non-diversity of citizenship or amount in controversy, none of the Petitioners' suits were removable based upon federal diversity jurisdiction.[1]

Respondent moved to dismiss Petitioners' individual state court claims *for lack of subject matter jurisdiction*

1. Petitioner Leslie is a Canadian, the amount of Petitioner Spivey-Ferguson's claim does not exceed $75,000, and Petitioner Garcia lives in Florida.

based upon the following federal forum clause Respondent had recently installed in its cruise tickets[2]:

> 15. It is agreed by and between the Guest and Carnival that all disputes and matters arising under, or in connection with or incident to this Contract or the Guest's cruise, including travel to and from the vessel, shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, or as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami-Dade County, Florida, U.S.A., to the exclusion of the Courts of any other county, state or country.[3]

The practical effect of this ticket provision (which is actually *a sovereign-selection clause*) is to require non-diversity suits to be initiated on the non-jury admiralty side of U.S. district court. This applies, for example, to all U.S. citizens like Petitioner Garcia who happen to reside in Florida (where the major cruise lines maintain their principal places of business).

The state circuit court nevertheless determined that the clause in question was enforceable and therefore,

---

2. "A cruise ticket is a contract of adhesion." *Chan v. Society Expeditions*, 123 F.3d. 1287, 1291 (9th Cir. 1997).

3. Respondent's previous forum clauses required all suits to be filed in Florida but, unlike Respondent's new clause, did not compel suits to be filed in federal court. See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S.Ct. 1522 (1991).

granted Respondent's motions to dismiss Petitioners' state suits *for lack of subject matter jurisdiction.* Petitioners timely filed appeals to Florida's Third District Court of Appeal in Miami.

Petitioner Leslie's individual state appeal was the first to be heard; and the panel affirmed the trial court. See *Leslie, et al. v. Carnival Corp.*, 22 So.3d 561, 2008 A.M.C. 380 (Fla. App. 3 Dist. 2008) ("*Leslie I*") Thereafter, the Third District Court of Appeal granted rehearing *en banc.* The similar appeals of Petitioners Spivey-Ferguson and Garcia were consolidated with *Leslie I* for purposes of rehearing *en banc.*

In *Leslie, et al. v. Carnival Corporation*, 22 So.3d 567, 2010 A.M.C. 263 (Fla. App. 3 Dist. 2009) (*en banc*) ("*Leslie II*"), five out of the ten justices of the Third District Court of Appeal voted to reverse the dismissals of Petitioners' circuit court actions; and the remaining five *en banc* justices voted to affirm (which under the rules of that court amounted to an affirmance of the panel decision in *Leslie I*).

Simultaneously with the filing of the decision *en banc* in *Leslie II*, the panel in *Spivey-Ferguson v. Carnival* (one of the other appeals consolidated for rehearing *en banc*) certified the following "question of great public importance" to the Florida Supreme Court:

> IS CARNIVAL'S FORUM SELECTION CLAUSE ENFORCEABLE IN CIRCUMSTANCES WHERE, BECAUSE OF THE JURISDICTIONAL LIMITATIONS OF FEDERAL COURTS,

THE CLAUSE OPERATES TO DENY CERTAIN PLAINTIFFS, INCLUDING ALL FLORIDA CITIZENS, A RIGHT TO A JURY TRIAL IN FLORIDA WITHOUT NOTICE AND WITHOUT CONSENT TO WAIVING THIS RIGHT AS GUARANTEED UNDER ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION?

Spivey-Ferguson v. Carnival Corp., 22 So.3d 566 (Fla. App. 3 Dist. 2009)

Thereafter, all four consolidated appellants involved in *Leslie II* filed timely Notices To Invoke the discretionary jurisdiction of the Florida Supreme Court. That court's discretionary jurisdiction is limited to conflicting decisions of intermediate state appellate courts and those which certify questions of public importance. See Rule 9.030(a)(2), Fla. Rules of App. Proc.

On August 30, 2010, the Florida Supreme Court entered a single order declining discretionary review of all four cases, which included the question certified by the *Spivey-Ferguson* panel. See *Leslie v. Carnival Corp.*, 44 So.3d 1178 (Fla., Aug. 30, 2010).

This timely Petition for Certiorari ensued.

ARGUMENT FOR GRANTING THE PETITION

I. U.S. maritime law does not permit cruise lines to compel passengers to sue them only in federal court in contravention of the Saving To Suitors Clause.

A broad issue presented here is whether there remain external maritime public policy constraints on inserting a *sovereign-selection* forum clause in a marine passenger ticket for a "U.S. touching voyage," in light of this Court's general statement in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S.Ct. 1907, 1913 (1972) ("*The Bremen*") that forum clauses "are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." See generally, Mullenix, "Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court," 57 *Fordham L. Rev.* 291, 344-47, 352-54 (Dec. 1988).

In the present case, the Florida appellate court panel thought not. Instead, the panel interpreted *The Bremen* to mean that the only relevant consideration (even regarding a contract of adhesion) is whether a marine forum clause is "reasonable" *as between the parties*:

> As fully explained in *The Bremen*, in earlier times, '[m]any courts, federal and state, have declined to enforce such clauses on the ground they were 'contrary to public policy,'...[citation omitted]. Thus in former times, the outcome of this case might have been different. Today however, we find persuasive the more recent critique by the United States Supreme Court of that earlier view, also appearing in *The Bremen*.

Leslie v. Carnival Corp., 22 So.3d 561, 565, 2008 A.M.C. 380 (Fla. App. 3 Dist. 2008) ("*Leslie I*") (Shepherd, J.).

If "reasonableness" as between the parties were the only consideration, however, there would be no bar to enforcement of a maritime contract of adhesion calling for all suits *to be transferred to and heard by a particular federal judge*. Therefore, *somewhere*, there has to be a public policy force field that such clauses may not cross.

Petitioners, at every stage of the litigation below, argued that Respondent Carnival's new federal forum-only clause impermissibly abridges "the historic option of a maritime suitor to choose his forum, state or federal," enshrined since 1789 in the federal "Saving To Suitors Clause." See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 363, 370-71, 79 S.Ct. 468 (1959) ("Except in diversity cases, maritime litigation brought in state courts [cannot] be removed to the federal courts" because "making maritime cases removable to the federal courts...would make considerable inroads into the traditionally exercised concurrent jurisdiction of state courts in admiralty matters..a jurisdiction which it was the unquestioned aim of the saving clause of 1789 to preserve.")

Justice Shepherd, writing for the concurring justices in *Leslie II*, made the following astounding and inaccurate observation:

> ***First, the federal Saving to Suitors Clause confers no enforceable state court 'right' to***

a jury trial or anything else on a maritime plaintiff.[4]

Leslie II, 22 So.3d at 569 (Shepherd, J., concurring).

The Florida appellate court in Miami thus expressly rejected this Court's determination, in *Lewis v. Lewis & Clark Marine, Inc*, 531 U.S. 438, 121 S.Ct. 993 (2001), that maritime common law suitors in the U.S. *have an enforceable right* (conferred upon them by the Saving to Suitors Clause) to initiate and maintain their suits in state court, *even if no jury trial is requested.*

Petitioners argued below that state court enforcement of federal forum clauses like Respondent's would disrupt the uniformity of *in personam* maritime remedies which traditionally have been afforded to all maritime common law suitors in the U.S.[5]

---

4. As a result, the Florida appellate court perceived no material difference between a forum clause which operates to bar maritime common law suits from all state *fora* and a garden-variety geographical forum clause (of the type previously upheld by this Court in *Carnival Cruise Lines v. Shute*, 99 U.S. 585, 111 S.Ct. 1522 (1991). See *Leslie I*, 22 So.3d at 546 ("[I]f a contractual provision requiring one of Carnival's Washington State passengers to travel to Florida to litigate her shipboard personal injury claim is valid [in *Shute, supra*], then *a fortiori* it is not contractually unreasonable for Carnival to require Barry and Leslie to travel from the Miami-Dade County Circuit Court to the United States District Court for the Southern District of Florida to present their personal injury claims against Carnival in this case.").

5. Respondent's new federal forum clause eliminates "the historic option of a maritime suitor pursuing a common law remedy to select his forum, state or federal." See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 369, 79

(Cont'd)

The Florida appellate court expressly "acknowledge[d] the disruption to traditional maritime policy caused by Carnival's new forum selection clause," but enforced it anyway. *Leslie I*, 22 So.3d at 565 (Shepherd, J.)

Further insight into the current thinking of the Florida appellate court in Miami appears in a subsequent, similar decision:

> As with [*Leslie I*] the decision in this case accords with *ancient concepts of freedom of contract*, pursuant to which Mr. Weisenberg and Costa Crociere have agreed the dispute between them will be resolved in [non-jury federal admiralty court] which has existed for this purpose for more than 200 years.

See *Wiesenberg v. Costa Crociere, S.p.A.*, 35 So.3d 910, 914 (Fla. App. 3 Dist. 2010) (enforcing a marine forum clause limiting all passengers – even diversity suitors –

(Cont'd)
S.Ct. 468 (1959). Respondent's clause operates without warning to limit non-diversity suitors to non-jury federal admiralty court, *in circumstances where their ultimate diversity status may be unknown* ***or unknowable*** *at the time of contracting.* Florida citizens like Petitioner Garcia, for example, uniquely suffer this discriminatory outcome by reason of state residency alone. She and Petitioner Leslie (a Canadian) were both unaware *of Respondent's citizenship or residency* at the time of contracting. Therefore, even if Garcia and Leslie had been admiralty lawyers, neither could have had any idea at the time of contracting that they would be headed for admiralty court in the event of a cruise-related injury. Similarly, Petitioner Spivey-Ferguson could not possibly have known at the time of receiving her ticket that her future damages would not exceed the dollar amount necessary for diversity jurisdiction.

to federal admiralty court) (Shepherd, J., concurring in part, dissenting in part)(emphasis added)[6]

Thus in the Florida appellate court in Miami today, "ancient concepts of freedom of contract" now completely trump and moot all other considerations, including maritime uniformity and public policy concerns.

This thesis appears to derive at least in part from a selective reading, of the "*prima facie* valid" and "reasonable" phrases in *The Bremen, supra*, which gives no weight or deference to other language in *The Bremen* opinion that "[a] contractual choice of forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *The Bremen*, 407 U.S. at 15. Also cf., *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 540, 115 S.Ct. 2322 (1995) ("[W]ere there no subsequent opportunity for review and were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a *prospective waiver* of a

6. But compare *Sullivan v. Ajax Navigation Corp. and Celebrity Cruises, Inc.*, 881 F. Supp. 906, 1995 A.M.C. 2407 (S. D. N.Y. 1995)(refusing to enforce ticket provision expressly limiting suits to non-jury federal admiralty court); *McDonough v. Celebrity Cruises, Inc*, 2000 WL 341115 (S.D.N.Y. 2000)(same); and *Ginsberg v. Silverseas Cruises, Inc.*, 2004 WL 3656827 (S.D. Fla. 2004) (same); also cf., *Bailey v. Carnival Cruise Lines, Inc.*, 774 F.2d 1577, 1579, 1986 A.M.C. 1666 (11th Cir. 1985) ("[b]ecause a cruise ship of necessity frequently passes into and out of territorial waters, the appropriate forum varies with the location of the ship,.. *[i]t would, therefore, be incorrect to specify a federal forum on the ticket clause.*")(emphasis added)

party's right to pursue *statutory remedies* ..., we would have little hesitation in condemning the agreement as against public policy.'")(quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, 105 S.Ct. 3346 (1985))(emphasis added) See also, generally, Mullenix, "Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court," 57 *Fordham L. Rev.* 291 (Dec. 1988).

Petitioners also argued at every stage below that the court must apply and enforce 46 U.S.C. § 183c(a) (1936)-the seventy-five year old federal maritime non-waiver statute enacted by Congress to prevent vessel operators from inserting provisions into passenger tickets which operate to limit liability or court access.

46 U.S.C. § 183c(a) (1936) states:

> It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages

> therefor. *All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect.* (emphasis added)

[46 U.S.C. § 183c(a) was recodified and renumbered in 2006 to become 46 U.S.C. § 30509] This statute is declarative of a public policy. See *Moore v. American Scantic Line*, 30 F.Supp. 843, 846, 1939 A.M.C. 1525 (SDNY 1939).

The legislative history of 46 U.S.C. § 183c(a) (1936) was filed by Petitioner Leslie with the Florida appellate court in Miami.

In 1936, the House Committee responsible for 46 U.S.C. § 183c(a) (1936) observed:

> *Stipulations to Limit Liability Prohibited*
>
> During the course of the hearings on the bill (H.R. 9969) there was also brought to the attention of the committee a practice of providing on the reverse side of steamship tickets that in the event of damage or injury caused by the negligence or fault of the owner or his servants, the liability of the owner shall be limited to a stipulated amount, in some cases $5,000, and in others substantially lower amounts, or that in such event the question of liability and the measure of damages shall be determined by arbitration. *The amendment to Chapter 6 of Title 48 of the*

> *Revised Statutes proposed to be made by Sect. 2 of the committee amendment is intended to, and in the opinion of the committee will, put a stop to all such practices* ***and practices of a like character****.* (emphasis added)

H.R. Rep. No. 2517, 74th Cong., 2d Sess., 6-7 (Apr. 23 1936). Identical language appeared in the corresponding Senate Report. See S.Rep. No. 2061, 74th Cong., 2d Sess., 6-7 (May 12, 1936).

A preliminary version of the same bill (which had passed the House as § 4283B), read:

> It shall be unlawful for the manager, agent, master, or owner of any vessel, transporting passengers or merchandise or property from or between ports of the United States and foreign ports, to provide, by rule, contract, regulation or otherwise, that the ship, the ship owner, the master, or agent, shall be relieved from liability beyond any stipulated amount for loss of life or bodily injury arising from the negligence, or fault of the ship owners or their servants; *or whereby the right of any claimant to a trial by a court of competent jurisdiction* ***and a jury*** *on the questions of negligence or liability or the measure of damages shall in any way be lessened, weakened or avoided.* (emphasis added)

See Safety of Life and Property at Sea: Hearings before the House Committee on Merchant Marine and Fisheries; 74th Cong., 2nd Sess., pt. 4, pp. 109-110 (1936) [hereinafter, "*1936 House Hearings*"]

The "jury" reference was removed from the final version of 46 U.S.C. § 183c(a) (1936) because (a) it was felt that such language might be interpreted as requiring jury trials in federal admiralty court; and (b) the major, active proponents of the bill believed that specific language about "a jury" was unnecessary **because the Saving To Suitors Clause, by ensuring state court access, would in any event provide a reliable pathway to a jury trial on demand.**

> A Department of Commerce Report on the bill stated:
>
> The reference in § 4283B of the bill to the right to trial by jury is worthy of consideration. It might be interpreted as giving the right of trial by jury in all cases within that section *in courts of admiralty*. If so, this would be a departure from the usual and long established practice and in such cases would tend to the loss of advantage that experience has demonstrated accrue from the peculiar adaptability of courts of admiralty for the trial and adjudication of such controversies... (emphasis added)
>
> Moreover, *Revised Statutes, page 563* (U.S.C. Title 28, Sect. 41 (3)) saves to suitors "the right of a common law remedy where the common law is competent to give it" in all cases of admiralty and maritime jurisdiction. This is part of the Judiciary Act of 1789. The common law is not competent to give a remedy *in rem, but in all other respects the right of trial by*

> *jury is available to claimants.* (emphasis added)
>
> Probably this section would give the right of trial by jury in proceedings [in federal admiralty court] to limit liability. *It is suggested that the "right of trial by jury" provision is of doubtful value and would not materially make for the benefit of claimants.* (emphasis added)

See **1936 House Hearings**, at pp. 136-137.

> Adele Springer, Esq., one of the chief proponents of the legislation, testified:
>
> The report of the Department of Commerce states further that Sec. 4283B of the bill might be misconstrued as giving passengers a right to trial by jury. The bill does not designate in what instances claimants may demand jury trials *but simply reserves to them any such rights they may have under the statutes.* If they have no such right, then the bill does not affect them, as nothing is there to be "lessened, weakened or avoided." It is only when passengers choose to bring their actions in admiralty that no right exists to trial by jury. *They still have, however, a common law right to start suit on the common law side of the court before a jury.* (emphasis added)

1936 House Hearings, at pp. 46-48.

Thus, the **rights** afforded by Saving To Suitors (including the right to be in state court *even if no jury is requested*) were expressly presumed to be within the protection of 46 U.S.C.§ 183c(a) (1936) by the bill's major proponents, during discussions contemporaneous to its final passage in 1936.

Petitioners argued at every stage below that a threshold inquiry must be whether Respondent's sovereign selection clause **is void** pursuant to this Court's methodology and analysis in *Boyd v. Grand Trunk Western R. Co.*, 338 U.S. 263, 1950 A.M.C. 26 (1949) In *Boyd*, the plaintiff's employment contract contained a forum clause which eliminated some of the *fora* otherwise eligible for the suit under the Federal Employers Liability Act ("FELA").

FELA has a non-waiver provision. See 45 U.S.C. § 55.

The Court in *Boyd* measured the employer's *fora*-limiting clause against 45 U.S.C. § 55 and determined that "petitioner's [federal statutory] right to bring the suit in any eligible forum is a right of sufficient substantiality to be included within the Congressional mandate [of FELA] that "any contract..., the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability...shall to that extent be void.'" *Boyd, supra*, 338 U.S. at 266.

The maritime non-waiver provisions of 46 U.S.C. § 183c(a) (1936) are virtually identical to those in FELA which were analyzed and enforced by this Court in *Boyd, supra*.

Therefore, the Florida appellate court in the present case needed to determine whether "the historic option [under Saving To Suitors] of a maritime suitor pursuing a common-law remedy to select his forum, state or federal" was protected by 46 U.S.C. § 183c(a).[7]

Instead, the Florida appellate court skipped over that step entirely and determined the enforceability of Respondent's new federal clause based solely upon a test of "reasonableness" *as between the parties* (the test prescribed in *Shute, supra*, for garden-variety geographical forum clauses in maritime contracts of adhesion, *e.g.*, passenger tickets for cruises).

In doing so, the Florida appellate court in both Leslie I and II curiously refused even to acknowledge the existence of either Boyd, supra, or 46 U.S.C. § 183c(a), supra, let alone to distinguish them.

The Florida appellate court in Miami has apparently adopted the belief that, in a maritime common law case, it is not required even to consider (let alone to enforce) applicable federal maritime statutes, *e.g.*, 28 U.S.C. § 1333(1) and/or 46 U.S.C. § 183c(a), - *and there's nothing that Congress can do about it.* See *Leslie II*, 22 So. 3d at 569 ("[I]t is oxymoronic under our federal system of government to think that the United States Congress has the power to command a state court to exercise its jurisdiction to do anything.") (Shepherd, J., concurring)

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7. See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 369, 79 S.Ct. 468 (1959).

There is, however, something **this Court** can do about it, which is another reason why the present Petition should be granted.

One of the great realizations - and ironies - that has emerged from this particular litigation is that the enforceability of a federal forum clause, which literally requires all disputes to be brought to federal court for decision, appears to be determinable *only by state courts* in actions filed there in defiance of the clause.[8]

As a consequence, the uniformity of how the Saving To Suitors Clause is interpreted and applied has suffered. Compare, *e.g.*, *Leslie I*, *supra*, and *Oltman v. Holland America Line –USA*, 163 Wash. 2d 236, 178 P. 3d 981 (Wash. 2008)(Saving To Suitors Clause confers no right to state court access) with *Nunez v. American Seafoods*, 52 P.3d 720 (Alaska 2002)(refusing to enforce federal forum clause which violated seaman's right under Saving To Suitors to sue in an "eligible" state forum).

This petition may well present the final, realistic opportunity *for a federal court* to take control of these issues, because state appellate decisions like *Leslie I*,

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8. At an early stage, Petitioner Leslie and Kathryn Barry, a Florida citizen injured on one of Respondent's vessels, filed a joint declaratory action asking the U.S. District Court in Miami to determine the enforceability of the clause. This declaratory action was dismissed for lack of standing, however, because the district judge believed that the enforceability of Respondent's federal forum clause needed to be determined by a state court. *Barry v. Carnival Corp.*, 424 F. Supp. 2d 1354 (S.D. Fla. 2006), *aff'd*, 257 Fed. Appx. 224 (11th Cir. 2007)

supra, and *Oltman, supra,* if left unchecked, will facilitate a massive clearing of such suits from state to federal dockets. Once such a suit is initiated in federal court (as required by a federal clause in a cruise ticket) the issues raised in this petition essentially become procedurally moot.

That represents another great irony.

Leslie I and *II, supra,* and *Wiesenberg, supra,* illustrate an urgent need for this Court to remove any confusion which may have been engendered by *The Bremen* and its progeny, and to explain to courts like the Florida appellate court in Miami that there remain certain federal maritime laws and public policy, *e.g.* the Saving To Suitors Clause and/or the maritime non-waiver provisions of 46 U.S.C. § 183c(a) (1936) - which may not cavalierly be ignored or sacrificed wholesale by state courts on the altar of freedom of contract (especially where a forum clause in a marine passenger contract of adhesion is involved).

II. A federal forum clause in a marine passenger ticket contract of adhesion, which bars access to state court and *sub silentio* waives the right of non-diversity suitors to a jury trial, is unreasonable *per se* and does not pass the test for such maritime adhesion contracts enunciated in *Carnival Cruise Lines v. Shute,* 499 U.S. 585, 111 S.Ct. 1522 (1991)

In *The Bremen, supra,* this Court determined that forum selection clauses in freely-negotiated, arms-length, maritime commercial contracts generally "are *prima facie* valid and should be enforced unless

enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. at 10. Elsewhere in the same opinion, however, the Court stated, "A contractual choice-of forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision." *Id.* at 15.

In *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S.Ct. 1522 (1991), the Court applied *The Bremen* and enforced Carnival's old, purely geographical forum clause (in a cruise ticket contract of adhesion). At the outset, the Court noted, "[T]his is a case *in admiralty*, and federal law governs the enforceability of the forum-selection clause we scrutinize." 499 U.S. at 590 (emphasis added)

Both *The Bremen, supra,* and *Shute, supra*, as noted, were initiated as federal suits **in admiralty**. Neither case began as a savings clause case in a state court. Therefore, unlike the present case, neither *The Bremen* nor *Shute* implicated rights afforded by the Saving To Suitors Clause, including the general right of a maritime common law suitor in the U.S. to access state court, *even if no jury trial is requested.* See *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 121 S.Ct. 993 (2001).

Mrs. Shute, for example, had no federal statutory right to maintain her suit in Washington as opposed to Florida. By contrast, Petitioners in the present case have a general federal statutory right (under Saving To Suitors) to initiate and maintain their suits in state court,

see Lewis v. Lewis & Clark Marine, supra, which is abridged by Respondent's current (federal) forum clause.

In the present case, half of the justices comprising the Florida appellate court in Miami believed that Respondent's new sovereign selection clause is unreasonable *per se* because it operates *without warning* to deny non-diversity plaintiffs, including all Florida citizens, the right to a jury trial on demand. These dissenting justices in *Leslie II* stated, *inter alia*:

> This particular Forum Clause is unenforceable with regard to the federal forum, as it operates to deprive appellants of their constitutional right to a jury trial without notice and without consent. Art. I, § 22, Fla. Const.
>
> ....
>
> On its face, the Forum Clause appears to operate as any ordinary forum clause, that is, it restricts the filing of a lawsuit against Carnival to a particular forum, namely the United States District Court for the Southern District of Florida. However, because of the jurisdictional limitations of federal courts, this Forum Clause actually operates to deprive certain passengers, including all of [these Petitioners], of their right to a trial by jury without notification or consent.
>
> ...

The concurring opinion posits that the application of federal law in maritime cases somehow minimizes the clear existence of concurrent state court jurisdiction over cases such as these and the accompanying right to a jury trial in our state courts. Of course there is not a single case in American jurisprudence which supports this position. If that were the case, in a properly filed "saving to suitors" case, Carnival would be able to avoid a jury trial in our state courts by resorting to the concurring opinion's "supremacy of federal maritime law" contrivance. No case has ever reached such a result.

...

The ... "reasonably communicated" standard, under federal maritime law, governs our review of this provision of [Respondent's] Forum Clause. Thus the application of federal maritime law...requires that we look to whether the notice of waiver of the right to a "jury trial" was "reasonably communicated."

...

Here, applying Carnival's forum clause to the jurisdictional restrictions of the federal courts, it is readily apparent that this is no ordinary forum selection clause. Instead, in the case of [Petitioners Leslie, Spivey-Ferguson, and Garcia] Carnival's forum clause actually operates as a waiver of their right to a jury trial in state court without notice and consent.

...

> [Petitioners Leslie, Spivey-Ferguson, and Garcia] were not aware of the existence of the Forum Clause, much less the language contained therein, until after they purchased their non-refundable cruises. Furthermore, a determination that appellants knowingly waived their right to a jury trial requires of a lay person the multi-layered understanding of the intricacies of federal jurisdiction and the implication of limiting their claims to admiralty court. In addition the lay person would necessarily have to know these concepts before receiving the Forum Clause giving rise to such jurisdictional limitations.[9]

...

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9. Therefore, the panel opinion in *Leslie I* is very misleading when it states, "[T]he passengers do not contest that the clause, which was referenced expressly in a bold face "**Important Notice To Guests**" on the first page of the Ticket Contract, was "reasonably communicated" to them as required by federal maritime law." *Leslie I*, 22 So.3d at 562 n.2 (a statement lifted almost *verbatim* from Respondent's answer brief). Petitioners did not and do not contest physically receiving the ticket, but they did and do strenuously dispute that the prospects of either admiralty court or the waiver of a jury trial on demand were ever "communicated" to them at all, "reasonably" or otherwise. Petitioner Leslie filed a motion for partial summary judgment and affidavit to that effect. Leslie's trial court denied his motion when it granted Respondent's motion to dismiss *for lack of subject matter jurisdiction.*

> The federal forum clause in this case is *fundamentally unfair* because it eliminates trial by jury as a matter of right for any passenger who is unable to establish federal jurisdiction on the basis of diversity of jurisdiction.
>
> ...
>
> In the cases before us,...there is *overreaching* [by Respondent Carnival] because the effect of the Forum Clause was not disclosed and, in any event, this contractual provision was not provided to the passengers until they had already purchased their tickets.

Leslie II, 22 So.3d at 576-77, 579-80, 582, 585 (Cortinas, J. dissenting) (emphasis added)

We would also respectfully assert that the clause is unreasonable *per se* simply because it denies maritime common law suitors the federal statutory right under Saving To Suitors to be and remain in state court in the first place. See *Lewis & Clark Marine, Inc*, 531 U.S. 438, 121 S.Ct. 993 (2001); see also entire discussion under Pt. I, *supra*.

When such a clause undeniably abridges a fundamental right, the burden of demonstrating reasonableness *should properly be on the proponent of the clause.*

Respondent never introduced evidence below explaining how anyone, including Respondent, would benefit merely by clearing passenger suits from one Miami courthouse to another in Miami, let alone by restricting Respondent's non-diversity passengers to the non-jury admiralty side of U.S. District Court in Miami while Respondent's diversity passengers remain eligible for the law side of the same court.

Respondent tried to mitigate this harmful and discriminatory effect of its clause by solemnly promising in open court never again to object in admiralty court to a request by a passenger-suitor for a binding jury pursuant to Rule 39(c) Fed. R. Civ. Pro. This canard was exposed by the dissenters in *Leslie II,* however, who correctly perceived that Respondent's consent to a binding jury in admiralty could not bind co-defendants (or the federal district court for that matter) *Leslie II*, 22 So. 3d at 584-85 (Cortinas, J., dissenting).[10] More

10. While the matter was pending before the Florida Supreme Court, Kathryn Barry (one of the four appellants in *Leslie II*) was required to go to trial in a protective federal lawsuit she had cross filed in 2005 in federal court (to toll the one-year suit limit in Respondent's cruise ticket). See *Barry v. Carnival Corp.*, Case No. 05-22549 – Civ – Ungaro (S.D.Fl.) Barry's federal case against Respondent had been stayed to permit Barry to pursue her state court remedy. However, after *Leslie II*, the district judge *sua sponte* lifted the stay in Barry's federal case, set the case for trial, *and subsequently denied the parties' joint motion for a binding jury trial.* On July 16, 2010, Barry's federal case ended in a bench judgment for Barry. Therefore, Barry is not a petitioner here. Petitioner Leslie's similar protective federal case remains stayed pending the outcome of this proceeding. See *Leslie v. Carnival Corp.*, Case No. 05-22550 – Civ-Moore (S.D. Fl.)

importantly, Respondent's pledge in no way can bind *the other major cruise lines, e.g.,* Royal Caribbean and Norwegian, who are now utilizing similar federal forum clauses (which will be deemed enforceable by reason of *Leslie I*) and who will remain perfectly free to withhold consent to requests for admiralty jury trials by *their* passenger-suitors.

Respondent's clause is fundamentally unreasonable and unfair even if Petitioners have the burden to so demonstrate.

In *Shute, supra,* this Court was impressed with certain logistical advantages perceived to flow from Respondent's former geographical clause. 499 U.S. at 594. Assuming that were ever true, Respondent's new federal forum clause (in the same locale) produces no marginal advantages compared to the prior clause, let alone enough to make up for depriving passenger-suitors of their federally-protected right to state court access and/or to a jury trial on demand.

This Court in *Shute* also believed that a single geographical forum for such suits would "spar[e] litigants the time and expense of pre-trial motions to determine the correct forum and conserv[e] judicial resources." 499 U.S. at 585.

Unlike a purely geographical clause, however, Respondent's new sovereign selection clause has just the opposite effect. Respondent's new (federal) clause in one breath requires federal initiation of "all disputes arising under, or in connection with or incident to this contract and the Guest's cruise," but in the next breath

expresses a caveat "as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction." Respondent in its new clause thus concedes that there may be some "cruise-arising" matters that would **not** satisfy the subject matter jurisdiction requirements of federal admiralty court.

An example of just such a scenario arose in *Marshall v. Norwegian Cruise Line, Ltd., et al.*, Case No. 05-21361-Civ-KING [*In Admiralty*] (S.D. Fl., order of dismissal [D.E. 83] entered September 11, 2006). There, the passenger was injured on a shore excursion purchased from the cruise line, which was clearly "cruise-related" but nevertheless later found to be without the court's maritime subject matter jurisdiction.

By *sub silentio* requiring non-diversity suitors to initiate "cruise-arising" suits only in federal admiralty court – *a court of extremely limited jurisdiction compared to a state court of general jurisdiction* – Respondent's clause confronts non-diversity passenger-suitors with the prospect, even if they obey the clause, that their federal suits in admiralty stand to be later dismissed for lack of maritime subject matter jurisdiction *after Respondent's contractual one-year suit limit has run*. Prudent suitors faced with this prospect would have no choice but to timely file two suits, one in federal court as required by the clause and another protective suit in state court – hardly "sparing the litigants [and courts] the time and expense of pretrial motions to determine the correct forum..." See *Shute, supra*, 499 U.S. at 494. This dilemma does not arise for litigants who have unrestricted access to a state common law court of general jurisdiction, as afforded by the Saving To Suitors Clause.

Finally, in *Shute*, the Court presumed that a fare-savings would result from a single geographic forum for all passenger suits. 499 U.S. at 594. In the present case, Respondent below neither contended nor showed any such thing as a consequence of, or justification for (a) depriving all passengers of their Saving To Suitors right to be in state court in the first place, and/or (b) depriving non-diversity passengers, *sub silentio*, of a jury trial on demand.

CONCLUSION

Respondent's current sovereign selection clause is neither "reasonable" nor "fundamentally fair," under any test or burden a court may choose to apply. Instead, it violates both the Saving to Suitors Clause and 46 U.S.C.§ 183c(a) (1936) and is therefore void.

Even the Florida appellate court expressly "acknowledge[d] the disruption to traditional maritime policy caused by Carnival's new forum selection clause," but enforced it anyway. *Leslie I*, 22 So.3d at 565 (Shepherd, J.)

The enforcement of such a clause has consequences which drive a stake through the heart of our traditional federalistic, maritime system of justice and the uniformity of remedies it affords maritime common law litigants.

Respondent's former geographical clause, which this Court was willing to review in *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S.Ct. 1522 (1991), did not.

The interpretation, significance, and application of the 221 year old federal Saving To Suitors Clause, and other applicable federal maritime law, should not be left up to parochial and conflicting decision-making by state courts only, as will be the case if this Court declines review here.

This Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT DATED NOVEMBER 25, 2009

DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT.

Nos. 3D06–2228, 3D07–1009, 3D07–627, 3D06–2226.

Nov. 25, 2009

Thomas LESLIE and Kathryn Barry, Appellants,

v.

CARNIVAL CORPORATION, etc., Appellee.

Laurine Spivey–Ferguson, Appellant,

v.

Carnival Corporation, etc., Appellee.

Grace Garcia, Appellant,

v.

Carnival Corporation, etc., Appellee.

Before RAMIREZ, C.J., and COPE, GERSTEN, WELLS, SHEPHERD, SUAREZ, CORTINAS, ROTHENBERG, LAGOA, and SALTER.

Appendix A

ON MOTION FOR REHEARING EN BANC

PER CURIAM.

Subsequent to the release of the panel opinion in *Leslie v. Carnival Corp.*, 22 So.3d 561, 561–62 (Fla. 3d DCA 2008), the Court consolidated this case with two others,[1] and by a majority vote of the active judges of this district, *see* Fla. R.App. P. 9.331(a), ordered that they be considered together *en banc* on the issue decided in the panel opinion. Upon consideration of the matter *en banc*, the Court is evenly divided. Judges Gersten, Wells, Shepherd, Suarez and Lagoa voted in favor of affirming the circuit court. Chief Judge Ramirez, and Judges Cope, Corninas, Rothenberg and Salter voted to reverse the decision of the circuit court. The effect of the vote is that the panel opinion stands. *Id.*

SHEPHERD, J., concurring.

I write further in this case only to offer the following additional considerations to balance those suggested by the dissent.[2]

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1. *Garcia v. Carnival Corp.*, No. 3D07–627, 2008 WL 440997, at *1 (Fla. 3d DCA Feb. 20, 2008); and *Spivey–Ferguson v. Carnival Corp.*, No. 3D07–1009, 2008 WL 373233, at *1 (Fla. 3d DCA Feb. 13, 2008).

2. I would be remiss if I did not point out that my first preference in these cases would have been to deny the motion for rehearing en banc on the ground that it fails to meet the threshold for rehearing en banc as required by Florida Rule of Appellate Procedure 9.331. *See Univ. of Miami v. Wilson*, 948 So.2d 774, 790–91 (Fla. 3d DCA 2006) (Shepherd, J., concurring). Having been obviously unpersuasive on this point, I proceed to the merits.

The issue in these cases is whether the respective trial courts erred by enforcing a forum-selection clause in form contracts issued by Carnival Cruise Lines to four of its fare-paying customers, which requires that

> **all disputes and matters whatsoever arising under, in connection with or incident to this Contract** or the Guest's cruise . . . **shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami,** or as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami– Dade County, Florida. . . .

(emphasis added). The dissent is disturbed that the natural workings of the clause deprive Florida citizens, foreign citizens, and all persons whose claims have a value of less than $75,000 of what it considers to be "a clear right to a jury trial in Florida's state courts . . . without notice or consent." *See infra* p. 576. The dissent finds the existence of this "right" in a federal statute—the historic Savings to Suitors Clause, now codified in the Judicial Code of the United States at 28 U.S.C. § 1333, but which has existed substantially unchanged in the Statutes of the United States since the inferior federal courts were established by the First Congress of the United States. *See* Judiciary Act of 1789 Ch. 20, § 9, 1 Stat. 77 (1789).[3] After locating this right in federal statutory law, the dissent then argues, by reference to

3. The Savings to Suitors Clause appeared as followed in section 9 of the Judiciary Act of 1789:

(Cont'd)

federal case law, that if an **express contractual waiver** of the right to a jury trial under the Seventh Amendment of the United States Constitution can only be enforced if made "knowingly and voluntarily," so also must the **effect** of a **forum-selection clause** in a maritime passenger cruise ticket, which, as the dissent admits, *see infra* p. 581, merely "inadvertently limit[s]" the ability of some passengers to obtain a jury trial. The dissent further argues the effect of the clause is simply "fundamentally unfair" within the meaning of federal

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(Cont'd)

> That the district courts shall have, exclusively of the courts of the several States TTT exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; **saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it** . . . .

Since 1789, there have been just three changes in the Clause. *See* 28 U.S.C. §§ 41(3) and 371(3) (1940 ed.) (substituting the words "any other remedy to which he is otherwise entitled" for the words "the right of a common-law remedy where the common law is competent to give it"); Act of June 25, 1948, c. 646, 62 Stat. 931 ("saving to the libellant or petitioner in all cases all other remedies to which they are otherwise entitled"); Act of May 24, 1949, ch. 139, § 79, 63 Stat. 101 ("saving to suitors in all cases all other remedies to which they are otherwise entitled").

maritime law as it applies to form cruise ship contracts of passage. I will treat each argument in turn.

First, the federal Savings to Suitors Clause confers no enforceable state court "right" to a jury trial or anything else on a maritime plaintiff. In fact, it is oxymoronic under our federal system of government to think that the United States Congress has the power to command a state court to exercise its jurisdiction to do anything. *See* U.S. Const. art. III, § 2; *U.S. v. Butler*, 297 U.S. 1, 68, 56 S.Ct. 312, 80 L.Ed. 477 (1936) ("[T]he United States is a government of delegated powers, [and] those [powers] not expressly granted, or reasonably to be implied . . . are reserved to the states or to the people."). Rather, history demonstrates that the Savings to Suitors Clause was inserted in the First Judiciary Act "probably, from abundant caution, lest the exclusive terms in which the [admiralty and maritime] power is conferred on the District Courts might be deemed to have taken away the concurrent remedy which had before existed." *See Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 444, 121 S.Ct. 993, 148 L.Ed.2d 931 (2001) (quoting *N.J. Steam Navigation Co. v. Merchants' Bank of Boston*, 47 U.S. (6 How.) 344, 390, 12 L.Ed. 465 (1848)); *see also supra* p. 568–69, fn. 3. More importantly for our discussion here, it also is evident, when viewed in a historical context, the insertion of the Clause in the First Judiciary Act had nothing to do with any affinity of the First Congress for juries in admiralty or maritime matters. In fact, history proves just the opposite.

Appendix A

During the decade before the Constitutional Convention, most Americans had little experience with any courts which had jurisdiction beyond the boundaries of their own states. *See* Henry J. Borguignon, *The Federal Key to the Judiciary Act of 1789,* 46 S.C.L.Rev. 647, 652 (Summer 1995). However, some of the participants in the Convention knew first hand that admiralty jurisdiction had international ramifications. *Id.* at 653. Disputes involving capture and prize [4] were prevalent.

See Raymond S. August, *Trial by Jury in a Court of Admiralty: A Constitutional Right buried under Historical Ignorance,* 13 J. Mar. L. & Com. 149, 167–68 (1982); *see also* 1 Steven F. Friedell, Benedict on Admiralty § 81 (7th rev. ed. 2006). In many states, cases in admiralty were treated as most other cases, which meant their trial by jury. *See* August, 13 J. Mar. L. & Com. at 168–69. Procedure and jurisdiction in these courts were "uncontrolled and divergent." *See* 1 Thomas J. Schoenbaum, Admiralty and Maritime Law §§ 1–6 (4th ed.2004). Because juries were pre-disposed to decide these cases based upon local prejudice—rather than by

4. Prize in maritime law refers to the private property of an enemy that a belligerent captures on the high seas or that a belligerent authorizes to be taken by a privateer on its behalf. The national interest in the proper adjudication of cases of capture and prize is highlighted by the fact that the first national court created by the United States Congress was the Court of Appeals in Cases of Capture. *See* Comment, *Powell v. Offshore Navigation, Inc.: Jurisdiction Over Maritime Claims and the Rights to Trial by Jury,* 82 Col. L.Rev. 784, 808 n. 164 (1982).

law or justice—hostility, both interstate and international, manifested. David W. Robertson, Admiralty and Federalism 101 (1970). For these reasons, as the delegates to the Constitutional Convention arrived in Philadelphia in 1787, there was general agreement that a system of national admiralty courts was needed to ensure uniformity in the treatment of maritime cases involving both prize and instance. *See* Schoenbaum, *supra* at §§ 1–6.[5] The delegates' method for so doing was to include in the judicial article of the proposed Constitution a provision that "[t]he judicial Power shall extend to . . . all cases of admiralty and maritime jurisdiction." U.S. Const. art. III, § 2.

Except for the establishment of the United States Supreme Court, however, the organization of the federal courts was not self-executing. *See* U.S. Const. art. III, § 1. Rather, it fell to the First Congress to organize the lower courts of the United States. *See* Judiciary Act of 1789 Ch. 20, 1 Stat. 77 (1789). In so doing, the First Congress reposed in "district courts" the "exclusive cognizance of all civil causes of admiralty and maritime jurisdiction." Judiciary Act of 1789 Ch. 20, § 9, 1 Stat.

5. On this point, Alexander Hamilton appears to have captured the sentiment, if not the spirit, of the day when he wrote in Federalist 80: "[T]he most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend upon the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important of them are, by the present Confederation, submitted to federal jurisdiction." The Federalist, *A Commentary on the Constitution of the United States: Alexander Hamilton, James Madison and John Jay* 511 (Robert Scigliano, ed., Random House 2000)(1787).

77 (1789). To enhance uniformity, the Congress further provided that "trials of issues in fact, in the [United States] District Courts, in all causes **except** civil causes of admiralty and maritime jurisdiction, shall be by jury." *Id.* (emphasis added). In a bow to historical custom, however, the Congress also resolved to "sav[e] to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." *Id.* When viewed in its historical context, it is self-evident the Savings to Suitors Clause was not inserted in the Judiciary Act of 1789 as some type of federal uber guarantee of a particular state constitutional right. By asserting that "the grant [by that Congress] of concurrent jurisdiction to state courts under the 'savings to suitors' provision **essentially afforded** [the cruise line passengers in this case] a fundamental right to a jury trial when filing certain admiralty and maritime claims in state court," *see infra* p. 579 (emphasis added), the dissent trifles with history.[6], [7]

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6. The dissent tries to draw some solace from a single line in *Lewis*, 531 U.S. at 445, 121 S.Ct. 993, which characterizes the Savings to Suitors Clause as a "grant to state courts of in personam jurisdiction, concurrent with admiralty courts." *See infra* p. 579. As I have previously indicated, however, *see supra* p. 569, the *Lewis* Court expressly recognizes just a few lines earlier, *see Lewis*, 531 U.S. at 444, 121 S.Ct. 993, that the Clause was "inserted probably, from abundant caution" lest Section 9 of the First Judiciary Act be misinterpreted to operate as a pre-emption clause. A casual perusal of the passages both before and after the line seized upon by the dissent makes plain that *Lewis* cannot be read so literally.

7. While it may seem counter-intuitive today, the proceedings of the Constitutional Convention reflect that the (Cont'd)

Nor have the federal jury waiver cases—*Sullivan v. Ajax Navigation Corp.*, 881 F.Supp. 906, 908 (S.D.N.Y.1995), *Ginsberg v. Silversea Cruises Ltd.*, No. 03– 62141–CIV, 2004 WL 3656827, at *1 (S.D.Fla. Mar. 18, 2004) and *McDonough v. Celebrity Cruises, Inc.*, No. 98 Civ. 1517(RWS), 2000 WL 341115, at *1 (S.D.N.Y. Mar. 30, 2000)—which the dissent collectively hail as "[having] considered the issue before us," *see infra* p. 582, done so. Unlike our case, each of these cases is a federal diversity case in which the cruise line operator, by sentient design, sought to divest **each and every one** of its passenger customers their absolute Seventh Amendment **constitutional** right to demand a jury trial on the law side of the federal court in the event of a dispute through the use of an **express contractual waiver.** *See Sullivan*, 881 F.Supp. at 908 (ticket contract requiring any action against the cruise line be "instituted in the United States District Court for the Southern District of New York as an admiralty or

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proponents of enshrining an express right to a jury trial in the Constitution in civil cases, eventually accomplished by the adoption of the Seventh Amendment, were not motivated so much by a felt need to memorialize a revered right as out of a concern that the lifetime appointment of federal judges would make them partial to governmental interests. *See* Deborah J. Matties, *A Case for Judicial Self-Restraint in Interpreting Contactual Jury Waivers in Federal Court*, 65 Geo. Wash. L. Rev 431, 435–437 (March 1997); *see also* Benjamin V. Madison, III, *Trial by Jury or By Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty? An Examination of Principles that Transcend the U.S. Constitution*, 17 U. Fla. J.L. & Pub. Pol'y 347, 393 (Dec.2006).

maritime action **without demand for a jury trial.**") (emphasis added); *Ginsberg,* 2004 WL 3656827, at *1 (ticket contract providing "passenger agrees that all disputes and matters whatsoever arising in connection with the ticket shall be tried by the federal court **'without jury.'** ") (emphasis added). *McDonough,* 2000 WL 341115, at *1 (involving an express jury waiver under "virtually identical circumstances" to *Sullivan*). In sharp contrast, there is no evidence of sentient design by Carnival in this case.[8] Equally important, there is no federal constitutional issue before us. *See Waring v. Clarke,* 46 U.S. (5 How.) 441, 460, 12 L.Ed. 226 (1847) ("[W]e cannot see how [admiralty and maritime trials] are to be embraced in the [S]eventh [A]mendment of the [C]onstitution[.]"); *Curtis v. Loether,* 415 U.S. 189,

8. Carnival's prior forum selection clause permitted its passengers to file suit in any court located in the State of Florida. *See infra* p. 573, fn. 9. Carnival states it modified the clause because experience had proven the United States District Court for the Southern District of Florida to be a "more efficient" forum for the resolution of passenger disputes. According to Carnival, the efficiencies include the availability of electronic filing, strict Federal Rule of Civil Procedure Rule 26 discovery requirements, limitations on the number of depositions, strict pre-trial calendar deadlines and trial settings, and a more vigorous summary judgment procedure for disposal of meritless claims. One might also consider that concentrating this federal maritime litigation before the twenty-two active judges of the United States District for the Southern District of Florida, rather than spreading the cases more broadly, fosters the creation of a cadre of professionals for whom the law of the sea is a familiar sight. *See* Schoenbaum, *supra,* at §§ 4–4, 4–5 (discussing the wide variety of in rem and statutory proceedings over which the federal courts have exclusive jurisdiction).

193, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974) ("[T]he [Seventh] [A]mendment [should] be construed to embrace all suits which are not of equity and admiralty jurisdiction[.]"). These cases offer no assistance to the dissent in this case.

Second, the enforcement of this clause is not "fundamentally unfair." Again, we must remember that, as indicated by the dissent, these cases represent a narrow class of federal maritime disputes which the First Congress elected not to totally pre-empt from adjudication in state court. Accordingly, it is federal maritime law and not state substantive law or one's subjective judgment that governs the enforceability of the clause. *See Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 590, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991) ("[T]his is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize."); *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 766 (D.C.Cir.1992) (stating a cruise ticket is a maritime contract and the law to be applied is general federal maritime law).

It has only been in recent times that courts sitting in admiralty have had to examine the "fairness" of the substance of a forum selection clause in a maritime contract of passage because most courts have held such clauses to be void ab initio as "contrary to public policy." *See M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 9, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) (*The Bremen*); *see also Carbon Black Exp., Inc. v. The SS Monrosa,* 254 F.2d 297, 300–01 (5th Cir.1958) (holding that

"agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced"); *Prince Steam–Shipping Co. v. Lehman*, 39 F. 704, 704 (S.D.N.Y.1889) (holding the provision in the charter-party agreement "ousting the jurisdiction of all courts," except those in Philadelphia, was "against public policy, and void"). Just thirty-seven years ago, however, the United States Supreme Court in *The Bremen*—expanding on a decision just eight years earlier in which it upheld the enforcement of a contractual waiver of service of process, *see Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964)— declared that forum-selection clauses are prima facie valid and enforceable under general maritime law.

In so holding, the Supreme Court in *The Bremen* was mindful that ocean-going vessels travel through many jurisdictions, thus potentially becoming subject to the laws of a particular jurisdiction based upon a fortuitous event of an accident. The Court reasoned that "[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *The Bremen*, 407 U.S. at 13–14, 92 S.Ct. 1907. The Court continued, "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." *Id.* at 15, 92 S.Ct. 1907. The challenging party must "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.*

In *Shute*, 499 U.S. at 593, 111 S.Ct. 1522 the United States Supreme Court further "refine[d] the analysis of *The Bremen* to account for the realities of **form** passage contracts" (emphasis added), such as the one in this case. Drawing upon the principles enunciated in *The Bremen*, the Court in *Shute* concluded it was not "fundamentally unfair" under principles of general maritime law to enforce a non-negotiable predecessor clause to the one before us, which obligated Eulala Shute, a resident of Washington State who had suffered a shipboard injury off the coast of Mexico on a Carnival cruise she boarded in Los Angeles, California, to travel to Florida to bring her claim. *Shute*, 499 U.S. at 588, 111 S.Ct. 1522.[9] The Court articulated those principles as follows:

> As an initial matter, we do not adopt the Court of Appeals' determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining. Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: First, a cruise line has a **special interest** in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not

9. The clause in *Shute* required that "all disputes TTT arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country." *Id.* at 587–88, 111 S.Ct. 1522.

> unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.

Id. at 593–94 (internal citations omitted) (emphasis added).

Evaluating the "reasonableness" of the forum clause at issue in that case, *see id.* at 592, 111 S.Ct. 1522 the Court went on to observe:

> In this case, **there is no indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims. Any suggestion of such a bad-faith motive is belied by two facts:** Petitioner has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports.

> **Similarly, there is no evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching.** Finally, respondents have conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity. In the case before us, therefore, we conclude that the Court of Appeals erred in refusing to enforce the forum-selection clause.

Id. at 595, 111 S.Ct. 1522 (emphasis added). In our case, just as in *Shute,* there is no suggestion of bad faith motive on the part of Carnival. Nor is there any evidence of fraud or overreaching. Nor, finally, is there any evidence the plaintiffs will be mistreated or short-changed in any fashion by the judges of the United States District Court for the Southern District of Florida,[10] or that the judges will routinely deny cruise

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10. Although cast in the idiom of jury sanctity, I deduce from the arguments made that the plaintiffs' true concern is that the judges of the United States District Court somehow will be less favorable to them than a jury on issues of liability and compensation. However, analyses of empirical data from federal cases compiled by the Administrative Office of the United States Courts strongly suggest otherwise. *See, e.g.*, Theodore Eisenberg, *Judicial Decisionmaking in Federal Products Liability Cases, 1978–1997,* 49 DePaul L.Rev. 323, 323 (1999) ("The striking difference in trial win rates between judge and jury trials continues. Plaintiffs prevail in over 40% of the judge trials and only about 30% of the jury trials."); Carol J. DeFrances & Marika F.X. Litras, *Civil Trial Cases and Verdicts*

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ship passengers, such as these plaintiffs, jury trials if requested. The only evidence in the record of this case is that these plaintiffs and their successors will receive trials in courts specially established for this purpose, and which have more than 200 years of accumulated experience giving such trials. *See* Judiciary Act of 1789 Ch. 20, § 9, 1 Stat. 77 (1789) (establishing admiralty and maritime jurisdiction of federal courts). It is hard to fathom how this is "**fundamentally** unfair."

Furthermore, again under federal maritime law, the passengers in these cases received the notice to which they were legally entitled. Cruise ship tickets contain a multitude of conditions and limitations.[11] There is no

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in Large Counties, 1996, Bur. Justice Stats. Bul., Sept. 1999, at 1, 6 ("Plaintiffs were more likely to win in bench trial cases (62%) than in jury trial cases (49%)."); *see also* Thomas A. Eaton, et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 Ga. L.Rev. 1049, 1084 (2000).

11. The conditions and limitations in these passengers' ticket contracts ranged from the specific—limitations on liability for use of the ship's recreational and athletic equipment—to a final catch-all provision stating:

> Carnival shall have the benefit of all Statutes of the United States providing for limitation and exoneration from liability and the procedures provide (sic) thereby, including but not limited to Sections 4282, 4282A, 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States of America (USCA citation omitted); as well as all restrictions or exemptions from liability, when applicable, under the laws of any foreign nation.

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requirement under general maritime law that ticket recipients be advised of any unstated ramification of those limitations. Under federal maritime law, the **only** requirement is that the cruise ship operator **"reasonably communicate to . . . passenger[s] the existence [within the ticket] of important terms and conditions which affect legal rights[.]"** *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861, 864 (1st Cir.1983) (emphasis added); *Nash v. Kloster Cruise A/S*, 901 F.2d 1565, 1566 (11th Cir.1990) (stating courts will enforce limitations in passenger cruise tickets if the ticket contract "provide[s] the passenger with reasonably adequate notice that the limit existed and formed part of the passenger contract"). The notice provided to the plaintiff passengers in this case appears in bold-faced type on the first page of their ticket contracts as follows:

> **IMPORTANT NOTICE TO GUESTS**
>
> **THE GUEST TICKET CONTRACT IN THIS BOOKLET CONTAINS CONDITIONS ON NUMBERED PAGES 1 THROUGH 11 IN THE REAR PORTION OF THIS BOOKLET. YOUR ATTENTION IS DIRECTED TO THESE CONDITIONS, CERTAIN OF**

(Cont'd)

One might wonder whether this provision is any more enigmatic to the ordinary cruise ship passenger than the forum selection clause that occupies our time in this case, or whether the effects of either clause would be a determining factor to a cruise decision by the dissent's hypothetically fully conversant cruise passenger.

Appendix A

WHICH CONTAIN IMPORTANT LIMITATIONS ON THE RIGHTS OF GUESTS TO ASSERT CLAIMS AGAINST THE CRUISE LINE, VESSEL OR THEIR AGENTS OR EMPLOYEES. PLEASE READ THE CONTRACT AND THESE TERMS AND RETAIN THE CONTRACT FOR FUTURE REFERENCE.

Federal maritime case law from two United States Courts of Appeal have approved the "reasonable communicativeness" of notices, which are indistinguishable in form, location on the ticket contract, and content from the notice received by the passengers in this case. *See Marek v. Marpan Two, Inc.*, 817 F.2d 242, 246 (3d Cir.1987) (finding a notice printed in capital letters 1/16th inch high on the top of a cruise ticket folder stating "ACCEPTANCE OF THIS TICKET CONSTITUTES A CONTRACT. THE TERMS AND CONDITIONS OF WHICH ARE SET FORTH FULLY INSIDE. PLEASE READ CAREFULLY[,]" "reasonably communicate[d] the existence and importance of terms inside, including the time limits in ticket paragraph six" for bringing suit against the ship owner); *Nash*, 901 F.2d at 1567–68 (finding a bold-faced notice on the first page of a passenger ticket contract, denominated "CONTRACT OF PASSAGE," which bore "**Passengers are advised to read the terms and conditions of the Passenger Contract Ticket set forth below. Acceptance of this Passenger Contract Ticket by Passenger shall constitute the agreement of Passenger to these Terms and Conditions[,]**"

constituted adequate notice of a one year time limitation for bringing suit contained in the contract) (emphasis added); *see also Vega–Perez v. Carnival Cruise Lines*, 361 F.Supp.2d 1, 3–4 (D.Puerto Rico 2005) (finding notice "reasonably communicated" simply where "[p]laintiffs presumably became aware of the forum selection clause at the moment they received the travel tickets"). In addition, the United States District Court for the Southern District of Florida has found adequate notice in a passenger ticket containing the same forum selection clause as challenged by the plaintiffs in this case. *See Carnival Corp. v. Middleton*, 941 So.2d 421, 424 (Fla. 3d DCA 2006) (acknowledging that the United States District Court for the Southern District of Florida had enforced a forum-selection clause identical to the one before us over an objection based upon inadequate jury waiver). The guiding judicial principle in each of these cases appears to be that once notified, a ticket-holder will read and inquire.[12]

12. It should also be noted that Carnival's cruise ticket contract was available for viewing on Carnival's website during the time these passengers purchased their cruise vacations, and that the Welcome Aboard brochure included in the ticket packet provided to each passenger before embarking (containing the ticket contract, boarding pass(es), brochure, luggage tags and such other items as are needed pre-embarkation), meticulously and prominently directed each booked passengerto the terms and conditions of passage in the ticket contract as follows:

> If you look at the cover of your ticket book let, you will see an "Important Notice to Guests." This notice directs your attention to the terms and conditions of your contract. It is important to read this and be come acquainted with the specific conditions and limitations of your passage.

Appendix A

The paean to the "fundamental right to jury trial" under the United States and Florida constitutions found in the dissent is poignant. *See infra* p. 580–81. Its reminder—that any waiver of this fundamental right must be made knowingly and voluntarily—is gripping. *See infra* p. 581–83. The dissent forgets, however, that we are not dealing here with a judicial doctrine surrounding jury waiver clauses. Rather, we are dealing with a judicially created doctrine for determining when it is appropriate to enforce a forum-selection clause in a maritime case. Because of the constitutional dimension incorporated in a federal or state jury waiver, there exists greater procedural protection in the exercise of such waiver than is required for the enforcement of a forum-selection clause. *See* David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. Rich. L.Rev. 1085, 1114–16 (2002). Unlike jury waiver clauses, forum selection clauses have come to have a favored status. *See The Bremen*, 407 U.S. at 10, 92 S.Ct. 1907. For this reason, our High Court has placed "a heavy burden of proof" on a party seeking to escape from his contract to make a "strong showing" that the clause should be set aside. *Id.* at 15, 17, 92 S.Ct. 1907. The showing required is "that trial in the contractual forum will be so gravely difficult and inconvenient that [a party] will for all practical purposes be deprived of his day in court." *Id.* at 18, 92 S.Ct. 1907. As previously demonstrated, it can hardly be argued that it is "unreasonable" under the circumstances to enforce the forum selection clause in this case.

In sum, the dissents' contention—namely that the passenger-appellants in this case are somehow the victims of a violation of constitutional proportions—has no basis in law or fact. The passengers' grievance in this case lies with the United States Congress.[13]

GERSTEN, WELLS, SUAREZ, and LAGOA, JJ., concur.

CORTINAS, J., (dissenting).

This case involves a clear right to a jury trial in Florida's state courts that, through a choice of forum clause ("Forum Clause") in a cruise ticket contract, was taken away from the plaintiffs without notice or consent. In its pre-printed cruise tickets, which are provided to passengers after their purchase of a non-refundable cruise, Carnival includes a forum selection clause that provides as follows:

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13. The Congress is well aware of the prohibition which is the subject matter of the cruise passengers' angst in this case. On two occasions, once in 1939 and then again in 1954, the Congress considered amending the Judiciary Act of 1789 to authorize jury trials in admiralty and maritime cases, but for reasons of its own has not done so. *See* Kenneth H. Volk, Case Note, *Seamen's Personal Injury Claims–Suite in Admiralty–Jury Trial*, 22 J. Mar. L. & Com. 607, 611 & n. 21 (1991) (citing House Committee on the Judiciary, H.R. 2723, 76th Cong., 1 Sess; S. Rep. 2351, 83d Cong., 2d Sess. (1954)). Some cogently argue, even today, that the prohibition remains warranted. *See* Gary T. Sacks & Neal W. Settergren, *Juries Should Not be Trusted to Decide Admiralty Cases*, 34 J. Mar. L. & Com. 163 (Jan.2003).

> It is agreed by and between Guest and Carnival that all disputes and matters whatsoever arising under, in connection with or incident to this Contract or the Guest's cruise, including travel to and from the vessel, **shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, or as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami–Dade County, Florida, U.S.A., to the exclusion of the Courts of any other county, state or country.**

(Emphasis added). This particular Forum Clause is unenforceable with regard to the federal forum, as it operates to deprive appellants of their constitutional right to a jury trial without notice and without consent. Art. I, § 22, Fla. Const.

Each of the appellants' cases arises out of lawsuits filed against Carnival for personal injuries that allegedly occurred on Carnival ships. Kathryn Barry and Grace Garcia are both Florida citizens. Laurine Spivey–Ferguson is a citizen of Pennsylvania, and Thomas Leslie is a Canadian citizen. The relationship between the parties developed as one would expect; Carnival offered cruises for sale, the passengers purchased a cruise trip, and Carnival gave the passengers a ticket contract that memorialized the purchase and set forth its terms and conditions. Carnival provided neither the tickets nor the

corresponding Forum Clause until after the purchase had been completed.

On its face, the Forum Clause appears to operate as any ordinary forum selection clause, that is, it restricts the filing of a lawsuit against Carnival to a particular forum, namely the United States District Court for the Southern District of Florida. However, because of the jurisdictional limitations of the federal courts, this Forum Clause actually operates to deprive certain passengers, including all of the appellants, of their right to a trial by jury without notification and consent.

The Jurisdictional Limitations of the Federal Courts

In addition to federal question jurisdiction pursuant to 28 U.S.C. § 1331, which is inapplicable here, federal court jurisdiction is limited to cases where there is diversity of citizenship among the parties and the claim exceeds $75,000. Title 28 of the United States Code provides in pertinent part:

> **§ 1332. Diversity of citizenship; amount in controversy; costs**
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy **exceeds the sum or value of $75,000,** exclusive of interest and costs, **and is between—**

> **(1) citizens of different States;**
>
> **(2) citizens of a State and citizens or subjects of a foreign state;**
>
> . . . .
>
> **(c) For purposes of this section and section 1441 of this title—**
>
> > **(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . .** [14]

28 U.S.C. § 1332 (emphasis added).

In addition, federal courts also have jurisdiction over admiralty and maritime cases, including cases that involve the shipping industry and the transport of passengers by water. Title 28 also provides:

> **§ 1333. Admiralty, maritime and prize cases**
>
> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

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14. It is undisputed that Carnival is a Panama corporation but has its principal place of business in Miami, Florida.

> **(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.**

28 U.S.C. § 1333 (emphasis added).

However, in admiralty court there is no entitlement to a jury trial. *See* Fed. R.Civ.P. 38(e) ("These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h)."); *See also Green v. Ross*, 338 F.Supp. 365, 367 (S.D.Fla.1972) ("Apart from any independent jurisdictional basis . . . an admiralty claimant has no jury trial right unless [plaintiff] sues under a statute which expressly provides it. . . . ").

The jurisdictional limitations of the federal courts cause Florida residents to be precluded from the federal court's diversity jurisdiction and, accordingly, are restricted to the federal court's admiralty jurisdiction where there is no right to a jury trial. The federal court's jurisdictional limitations also preclude out-of-state plaintiffs whose claims do not exceed $75,000 from meeting the monetary threshold for diversity jurisdiction and, accordingly, these plaintiffs are similarly restricted to the federal court's admiralty jurisdiction, where there is no right to a jury trial.

Concurrent State Court Jurisdiction Over Certain Maritime Cases

State courts, through the "saving to suitors" provision of 28 U.S.C. § 1333, have concurrent

jurisdiction to hear certain civil admiralty and maritime cases, such as the ones before us, that otherwise would have been limited to federal courts. The U.S. Supreme Court has clearly held that the "saving" clause "leave[s] state courts 'competent' to adjudicate maritime causes of action in proceedings 'in personam,' that is, where the defendant is a person, not a ship or some other instrument of navigation." *Madruga v. Superior Court*, 346 U.S. 556, 560–61, 74 S.Ct. 298, 98 L.Ed. 290 (1954). Thus, although federal courts have exclusive jurisdiction over in rem actions, federal and state courts have concurrent jurisdiction over in personam actions, *see id.* at 561, 74 S.Ct. 298 and the effect of the clause is to give an in personam plaintiff "the choice of proceeding in an ordinary civil action in a state or federal court, rather than bringing a libel in admiralty in federal court." 14A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3672 (2009). As Wright, Miller and Cooper explain, section 1333 gives the "suitor" the following options:

> First, the claimant may invoke federal admiralty jurisdiction under the grant of original subject-matter jurisdiction over admiralty, maritime, and prize cases set out in Section 1333. Neither complete diversity of citizenship nor a minimum amount in controversy need be shown under the statute, but, if alternative bases of federal subject-matter jurisdiction exist, the plaintiff must affirmatively invoke admiralty jurisdiction. On the other hand, most plaintiffs will have no

> right to a trial by jury if they invoke the federal court's general admiralty and maritime jurisdiction.
>
> Second, by virtue of the saving-to-suitors clause, the plaintiff also has the option of either asserting his claim [at] law in a state court or bringing suit in a United States district court. However, to pursue the latter choice, the general requirements of complete diversity of citizenship and jurisdictional amount in controversy must be satisfied.

Id. (citations omitted).

The United States Supreme Court explained the genesis of the "saving to suitors" provision in *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 121 S.Ct. 993, 148 L.Ed.2d 931 (2001), as follows:

> Article III, § 2, of the United States Constitution vests federal courts with jurisdiction over all cases of admiralty and maritime jurisdiction. Section 9 of the Judiciary Act of 1789 codified this grant of exclusive original jurisdiction, but "sav[ed] to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Ch. 20, § 9, 1 Stat. 77. In the intervening years, Congress has revised the language of the saving to suitors clause, but its substance has remained largely

> unchanged. See 28 U.S.C. §§ 41(3) and 371 Third (1940 ed.) ("saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it"); 28 U.S.C. § 1333(1) (1946 ed., Supp. II) ("saving to the libellant or petitioner in every case any other remedy to which he is otherwise entitled"); Act of May 24, 1949, ch. 139, § 79, 63 Stat. 101 ("saving to suitors in all cases all other remedies to which they are otherwise entitled"). The jurisdictional statute now states that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . any civil case of admiralty or maritime jurisdiction, **saving to suitors in all cases all other remedies to which they are otherwise entitled.**" 28 U.S.C. § 1333(1) (emphasis added).

Lewis, 531 U.S. at 443–44, 121 S.Ct. 993.

The Supreme Court clearly "defined the saving to suitors clause as a grant to state courts of *in personam* jurisdiction, concurrent with admiralty courts." *Id.* at 445, 121 S.Ct. 993 (citing *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 123, 44 S.Ct. 274, 68 L.Ed. 582 (1924)). The Court also explained that "[t]rial by jury is an obvious, but not exclusive, example of the remedies available to suitors." *Lewis*, 531 U.S. at 454–55, 121 S.Ct. 993 (citing *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 153, 77 S.Ct. 1269, 1 L.Ed.2d 1246 (1957)); *Red Cross Line*, 264 U.S. at 123–25, 44 S.Ct. 274). Because state

courts, including Florida's, afford litigants a constitutional right to a jury trial, the grant of concurrent jurisdiction to state courts under the "saving to suitors" provision essentially afforded those parties a fundamental right to a jury trial when filing certain admiralty and maritime claims in state court.

The concurring opinion posits that the application of federal law in maritime cases somehow minimizes the clear existence of concurrent state court jurisdiction over cases such as these and the accompanying right to a jury trial in our state courts. Of course, there is not a single case in American jurisprudence which supports this position. If that were the case, in a properly filed "saving to suitors" case, Carnival would be able to avoid a jury trial in our state courts by resorting to the concurring opinion's "supremacy of federal maritime law" contrivance. No case has ever reached such a result.

Respectfully, the fact that federal law applies in maritime cases has little to do with this case or the issues before us. Instead, it is a red herring, worthy of momentary distraction without more. The concurring opinion alludes to the application of federal maritime law in construing the enforceability of a passenger cruise contract. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). It then concludes that, under federal maritime law, courts have enforced territorial forum selection clauses and, therefore, our Forum Clause must be enforced due to "supremacy of federal maritime law." However, this inquiry assumes we are dealing with an ordinary

territorial choice-of-forum clause that merely selects a particular forum over another. There is no dispute that, absent the waiver of the right to a jury trial, which is implicated in our particular Forum Clause, the selected forum would be upheld and enforced as it has been in our prior decisions where the right to a jury trial was not raised on appeal. See *Carnival Corp. v. Booth*, 946 So.2d 1112, 1116 (Fla. 3d DCA 2006). Of course, under *Shute*, the Forum Clause would have been enforceable to the extent that it operated as a territorial forum selection clause requiring a plaintiff to bring his or her lawsuit in Miami–Dade County, Florida. However, in this case, we are asked to review and examine the Forum Clause's further restriction to "the United States District Court for the Southern District of Florida in Miami." The same "reasonably communicated" standard, under federal maritime law, governs our review of this provision of the Forum Clause. Thus, the application of federal maritime law simply requires that we look to whether the notice of waiver of the right to a jury trial was "reasonably communicated." *See Shute*, 499 U.S. at 590, 111 S.Ct. 1522. Federal maritime law does not in any way diminish the clear concurrent state court jurisdiction over cases such as these or the concomitant right to a jury trial that exists in our state courts under the Florida Constitution.

Here, upon applying Carnival's Forum Clause to the jurisdictional restrictions of the federal courts, it is readily apparent that this is no ordinary forum selection clause. Instead, in the case of the appellants and other similar plaintiffs, Carnival's Forum Clause actually

operates as a waiver of their right to a jury trial in state court without notice or consent. For example, Florida residents such as Barry and Garcia cannot avail themselves of the federal court's diversity jurisdiction and, thus, are restricted to the federal court's admiralty jurisdiction where there is no right to a jury trial. Similarly, out-of-state plaintiffs whose claims do not exceed $75,000, such as Spivey–Ferguson, do not meet the monetary threshold for diversity jurisdiction and are also restricted to the federal court's admiralty jurisdiction, where there is no right to a jury trial. Finally, foreign plaintiffs such as Leslie are restricted to the federal court's admiralty jurisdiction without the right to a jury trial because, for purposes of § 1332(a)(2), "[e]ven if a corporation organized under the laws of a foreign nation maintains its principal place of business in a State, and is considered a citizen of that State, diversity i[s] nonetheless defeated if another alien party [e.g. Leslie] is present on the other side of the litigation." *Universal Licensing Corp. v. Paola del Lungo, S.p.A.*, 293 F.3d 579, 581 (2d Cir.2002) (quoting *Franceskin v. Credit Suisse*, 214 F.3d 253, 258 (2d Cir.2000)).

Fundamental Right to a Jury Trial in Florida's State Courts

The Florida Constitution expressly provides for the right to trial by jury. Article I, Section 22, of the Florida Constitution provides:

Appendix A

§ 22. Trial by Jury

> The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

Art. I, § 22, Fla. Const. Similarly, the Seventh Amendment of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amend VII, U.S. Const.

The right to a jury trial has been recognized as "a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment." *Jacob v. City of New York*, 315 U.S. 752, 752, 62 S.Ct. 854, 86 L.Ed. 1166 (1942). "A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Id.* Moreover, "[t]he trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." *Chauffeurs, Teamsters and Helpers, Local, No. 391 v. Terry*, 494 U.S. 558, 581, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (quoting

Parsons v. Bedford, Breedlove and Robeson, 28 U.S. (3 Pet.) 433, 7 L.Ed. 732 (1830)).

Florida courts have also consistently highlighted the importance of the right to a trial by jury. "Questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions." *Hollywood, Inc. v. City of Hollywood*, 321 So.2d 65, 71 (Fla.1975); *see also Hansard Constr. Corp. v. Rite Aid of Fla., Inc.*, 783 So.2d 307, 308 (Fla. 4th DCA 2001) ("Questions regarding the right to a jury trial should be resolved in favor of a jury trial ....") (citing *King Mountain Condo. Ass'n v. Gundlach*, 425 So.2d 569 (Fla. 4th DCA 1982)).

Although fundamental, the right to a jury trial may be expressly waived between parties. It has been long established that "the right to trial by jury may be waived, and the waiver is enforceable so long as it is made 'knowingly and voluntarily.' " *Great Earth Int'l Franchising Corp. v. Milks Dev.*, 311 F.Supp.2d 419, 437 (S.D.N.Y.2004) (upholding enforcement of jury trial waiver as knowing and voluntary where litigant's counsel had drafted the agreement at issue and provision was in capital letters) (quoting *Morgan Guar. Trust Co. v. Crane*, 36 F.Supp.2d 602, 603 (S.D.N.Y.1999)); *Allun v. W. United Life Assurance Co.*, 347 F.Supp.2d 1246 (M.D.Fla.2004) (holding waiver enforceable where parties were highly educated and sophisticated businesspeople represented by counsel, the waiver was conspicuously disclosed in multiple provisions of the parties' contract and the provisions at issue had been bargained for and negotiated).

By agreeing to file suit against Carnival only in the Southern District of Florida, residents of Florida or foreign states and those with claims less than $75,000 are inadvertently limited to the federal court's admiralty jurisdiction and effectively deprived of their constitutional right to a jury trial. In addressing whether a waiver of the right to a jury trial is entered knowingly, voluntarily, and intelligently, one federal court has stated:

> Courts consider a number of factors when determining whether a contractual jury trial waiver was entered into knowingly, voluntarily, and intelligently. Those factors include: (1) the conspicuousness of the provision in the contract; (2) the level of sophistication and experience of the parties entering into the contract; (3) the opportunity to negotiate terms of the contract; (4) the relative bargaining power of each party; and (5) whether the waiving party was represented by counsel. Although the factors play an important role in the Court's decision-making process, they are not determinative. Put another way, it is not whether any particular number of factors have been satisfied, but whether, in light of all the circumstances, the Court finds the waiver to be unconscionable, contrary to public policy, or simply unfair.

Allyn, 347 F.Supp.2d 1246, 1252 (M.D.Fla. 2004) (citing *Pers Travel Inc. v. Canal Square Assoc.*, 804 A.2d 1108,

1111 (D.C. 2002)). In evaluating jury waiver clauses, "courts have consistently examined the following factors: negotiability of the contract terms, disparity in bargaining power between the parties, the business acumen of the party opposing the waiver, and the conspicuousness of the jury waiver provision." *Sullivan v. Ajax Navigation Corp.*, 881 F.Supp. 906, 910 (S.D.N.Y.1995).

The few cases that have considered the issue before us have similarly safeguarded the fundamental right to a jury trial where there was not a knowing waiver. In *Ginsberg v. Silversea Cruises, Ltd., Inc.*, No. 03–62141–CIV, 2004 WL 3656827, (S.D.Fla. Mar. 18, 2004), a federal magistrate judge examined the enforceability of a provision waiving a jury trial present in a passenger ticket. Even though *Ginsberg* involved specific language that required cases to be tried in federal court "without jury," the issues are analogous. The *Ginsberg* court noted that "the Seventh Amendment right to a jury trial is fundamental and can only be relinquished knowingly and intentionally. A presumption exists against waiving the right to a jury trial." *Id.* at *1. In *Sullivan*, a federal court held that a forum selection clause containing language similar to the clause before us, was unenforceable where the cruise line operator was unable to prove that the passenger was aware she was relinquishing a constitutional right, the standardized forum selection language was drafted by the cruise line, and the passenger had no choice other than to accept

the contract as written.[15] *Sullivan*, 881 F.Supp. at 911. Also, in *McDonough v. Celebrity Cruises, Inc.*, No. 98 CIV. 1517(RWS), 2000 WL 341115 (S.D.N.Y. Mar. 30, 2000), the court rejected a cruise line's motion to strike a demand for jury trial on grounds that the "right to a jury is fundamental, 'and that its protection can only be relinquished knowingly and intentionally.' " *Id.* at *1.

Similarly, in the cases before us, appellants essentially waived their right to a jury trial in state court without the ability to negotiate, without an explanation of the applicable jurisdictional technicalities, and without advisement prior to purchase. Appellants were not aware of the existence of the Forum Clause, much less the language contained therein, until after they purchased their non-refundable cruises. Furthermore, a determination that appellants knowingly waived their right to a jury trial requires of a lay person the multi-layered understanding of the intricacies of federal jurisdiction and the implication of limiting their claims to admiralty court. In addition, the lay person would necessarily have to know these concepts before

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15. The passenger ticket in *Sullivan* required that any action against the carrier must be "instituted in the United States District Court for the Southern District of New York as an admiralty or maritime action without demand for jury trial." *Sullivan*, 881 F.Supp. at 908. The cover of the ticket also specified "*IMPORTANT NOTICE:* Please read the terms and conditions of transportation in this ticket which is a contract affecting your legal rights." *Id.*

receiving the Forum Clause giving rise to such jurisdictional implications.[16]

Carnival argues that courts have found certain clauses, such as arbitration provisions that essentially act as waivers of the right to a jury trial, to be enforceable absent an explicit waiver of the right to trial by jury.[17] *See Cooper v. MRM Inv. Co.*, 367 F.3d 493 (6th

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16. Although appellants contend that a waiver of jury trial is unenforceable under federal maritime law, the resolution of these cases does not require us to decide that issue. *See N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, 640 (Fla.2003) ("Pursuant to the doctrine of judicial restraint, we decline to address petitioners' remaining constitutional claims because resolution of those claims is unnecessary for the disposition of this case."); *Lake Towers, Inc. v. Axelrod*, 216 So.2d 86, 87 (Fla. 4th DCA 1968) ("We expressly [d]o not decide the sufficiency of the complaint or of the lis pendens, or any of the other matters raised by defendant, since such issues are not necessary to the disposition of this matter."); *see also PDK Labs., Inc. v. United States DEA*, 362 F.3d 786, 799 (D.C.Cir.2004) (Roberts, J., concurring) ("This is a sufficient ground for deciding this case, and the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more— counsels us to go no further.").

17. We note that an arbitration clause in a typical cruise contract would be prohibited under Title 46, United States Code, Section 30509(a)(1)(B), which provides, in part:

> § 30509. Provisions limiting liability for personal injury or death
>
> (a) Prohibition.—

(Cont'd)

Cir.2004). Carnival ignores the fact that courts have consistently held that the loss of a right to trial by jury is a "fairly obvious consequence of an agreement to arbitrate." *Henry v. Pizza Hut of Am., Inc.*, No. 6:07–cv–01128– Orl–DAB, 2007 WL 2827722, at *6 (M.D.Fla. Sept. 27, 2007) (quoting *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1371 (11th Cir.2005)); *Robert Bosch Corp. v. ASC Inc.*, 195 Fed.Appx. 503, 508 (6th Cir.2006) ("[T]he loss of a right to a civil jury trial is a 'fairly obvious consequence' of failing to object to an arbitration clause, and therefore, does not require an express waiver . . . .") (quoting *Cooper*, 367 F.3d at 506); *Kaplan v. Kimball Homes Florida, Inc.*, 915 So.2d 755

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> (1) In general.—The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, **may not include in a regulation or contract a provision limiting—**
>
> . . . .
>
> (B) the right of a claimant for personal injury or death to a **trial by court of competent jurisdiction.**

46 U.S.C. § 30509 (emphasis added). Thus, the clear and unambiguous language of Section 30509(a)(1)(B) would forbid Carnival from including an arbitration clause in its cruise contracts since such a clause would limit "the right of a claimant for personal injury or death to a trial by court of competent jurisdiction." 46 U.S.C. § 30509(a)(1)(B). Because an arbitration panel is not a court of competent jurisdiction, an arbitration clause in a case such as this one would be unenforceable.

(Fla. 2d DCA 2005) (finding that a specific waiver of the right to a jury trial was not necessary because "an agreement to arbitrate necessarily is understood to involve the relinquishment of the rights of access to courts and trial by jury."). Moreover, "[t]he Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes. . . ." *Cremin v. Merrill Lynch, Pierce, Fenner Smith, Inc.*, 957 F.Supp. 1460, 1471 (N.D.Ill.1997); *see also Caley v. Gulfstream Aerospace Corp.*, 428 F.3d at 1371. As such, although parties may freely contract to submit their claims to arbitration, it is generally accepted that they do so with the understanding that the right to a jury trial is being waived.

Carnival also argues that Florida courts and federal courts have upheld contractual forum selection clauses where the chosen forum does not allow the right to a jury trial. *See Kanner v. Pan Am. Assistance, Inc.*, 807 So.2d 80 (Fla. 3d DCA 2001) (holding forum selection clause requiring that suit be brought in Colombia enforceable); *Abbott Laboratories v. Takeda*, 476 F.3d 421 (7th Cir.2007) (affirming dismissal of action where underlying forum selection clause required that suit be filed in Japan depending on who was the plaintiff); *Regal–Beloit Corp. v. Kawasaki Kisen Kaisha, Ltd.*, 462 F.Supp.2d 1098 (C.D.Cal. 2006) (upholding forum selection clause requiring litigation in Tokyo). We find

these cases unpersuasive and also distinguishable. When parties to a contract specifically agree to bring their claims in a jurisdiction outside of the United States, they cannot reasonably expect that they will enjoy the same rights and laws available under the American legal system. As the *Abbott* court noted, "[w]hen it signed the [agreement containing the forum selection clause], [plaintiff] . . . could and no doubt did consider the potential inconvenience of litigating in Japan, but decided to risk it. It is bound by its choice." *Abbott*, 476 F.3d at 426. In the cases before us, appellants remained within the American legal system and had no reason to believe or assume that they would be deprived of their fundamental right to a jury trial.

Finally, Carnival posits that the Forum Clause should be enforced because Carnival assures us that they will not oppose any plaintiff's request for a jury trial in admiralty court.[18] Again, Carnival misses the point. A petition for a jury trial, even if unopposed, is not akin to a fundamental right to a trial by jury. Fundamental rights, having their origin in the express terms of the

18. However, we note that Carnival has opposed other plaintiffs' requests for a jury trial in federal admiralty court in the past. *See* Carnival's Motion to Strike Plaintiffs' Demand for Jury Trial and Memorandum of Law in Support Thereof in the case styled *Hayes v. Carnival Corp., d/b/a Carnival Cruise Line and/or Carnival*, Case No.: 06-20425 Civ-King/Garber (S.D.Fla.2006). At oral argument, Carnival stated that it has changed its corporate policy and will take all steps necessary to consent to jury trials brought in admiralty under the Forum Clause. *See* Fed. R.Civ.P. 39(c)(2).

United States and Florida constitutions or necessarily implied from those terms, are the most paramount of rights that may exist. *See Fox v. City of Pompano Beach*, 984 So.2d 664, 668 (Fla. 4th DCA 2008) ("The right to a trial by jury is a fundamental right under both the United States and Florida constitutions."); *Blair v. State*, 698 So.2d 1210, 1212–13 (Fla.1997).[19] Accordingly, to dilute a fundamental right to a jury trial by equating it with a mere request is to deny its very existence.

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19. In *Blair*, Justice Anstead elaborated on the importance of the right to a jury trial by emphasizing its historical significance as follows:

> Before addressing the facts of this case, we review and reaffirm the importance of the right to trial by jury in the United States and Florida. From the outset, the earliest American colonists "cherished the right to a trial by jury." Douglas E. Lahammer, Note, The *Federal Constitutional Right to Trial by Jury for The Offense of Driving While Intoxicated*, 73 Minn. L.Rev. 122, 125 n. 19 (1988). As evidence of this strong sentiment, the right to trial by jury was incorporated into King James I's Instructions for the Government of the Colony of Virginia, 1606; the Massachusetts Body of Liberties, 1628; the Concessions and Agreements of West New Jersey, 1677; and the Frame of Government of Pennsylvania, 1682. Lloyd E. Moore, *The Jury, Tool of Kings, Palladium of Liberty* 97–99 (1973); *Sources of Our Liberties* 37, 74, 185, 217 (Richard L. Perry ed., 1959).

Later, this right was of paramount importance to the Founding Fathers. Indeed, "[t]rial by jury, as instituted in England, was to the Founders an integral part of a judicial

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Even with Carnival's consent, the possibility of a jury trial in an admiralty matter remains entirely discretionary with the federal district court. Federal Rule of Civil Procedure 39(c) provides:

> **Advisory Jury; Jury Trial by Consent.** In an action not triable of right by a jury, the court, on motion or on its own:

(Cont'd)

system aimed at achieving justice." Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 Geo. Wash. L.Rev. 723, 742 (1993). Accordingly, the Founders, mindful of "royal encroachments on jury trial" and fearful of leaving this precious right to the whims of legislative prerogative, included protection of the right in the Declaration of Independence and included three separate provisions in the Constitution for the right to jury trial: Article III and later the Sixth and Seventh Amendments. *Id.* at 744–45. In addition, the "constitutions of the original 13 states and of every state later admitted to the United States contained some form of a jury trial right." Robert P. Connolly, Note, *The Petty Offense Exception and the Right to a Jury Trial*, 48 Fordham L.Rev. 205, 212 n. 51 (1979). No state has ever removed the right from its constitution. *Duncan v. Louisiana*, 391 U.S. 145, 153–54, 88 S.Ct. 1444, 1449–50, 20 L.Ed.2d 491 (1968). The right extends equally to criminal and civil cases, except in Louisiana, Colorado, and Wyoming, which only guarantee the right to trial by jury in criminal cases. See Henry H. Perritt, Jr., *"And the Whole Earth Was of One Language"—A Broad View of Dispute Resolution*, 29 Vill. L.Rev. 1221, 1320 n. 554 (1984); art. I, § 17, La. Const.; art. II, § 23, Colo. Const.; art. I, § 9, Wyo. Const.

Blair, 698 So.2d at 1212-13 (footnotes omitted).

> (1) may try any issue with an advisory jury; or
>
> (2) **may,** with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

Fed.R.Civ.P. 39(c)(1)-(2) (emphasis added). Rule 39(c) is permissive and the federal district court may—or may not—grant a jury trial even when Carnival has consented. Furthermore, any supposed acquiescence by Carnival to a jury trial in admiralty court would be of little consequence in multiple defendant cases since other parties would not be bound by Carnival's agreement.

In *Shute,* the United States Supreme Court said, "[i]t bears emphasis that forum-selection clauses contained in form passage contracts are subject to scrutiny for fundamental fairness." *Shute,* 499 U.S. at 595, 111 S.Ct. 1522. The federal portion of the Forum Clause in this case is fundamentally unfair because it eliminates trial by jury as a matter of right for any passenger who is unable to establish federal jurisdiction on the basis of diversity of citizenship. The Supreme Court went on to say:

> Similarly, there is no evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching. Finally, respondents have conceded that they were

> given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity.

Id. In the cases before us, by contrast, there is overreaching because the effect of the Forum Clause was not disclosed and, in any event, this contractual provision was not provided to the passengers until they had already purchased their tickets.

For the foregoing reasons, we would grant the motion for rehearing en banc and find the federal court portion of the Forum Clause at issue here is unenforceable as it operates to deprive appellants of their constitutional right to a jury trial without notice and without consent. The federal portion of the Forum Clause is clearly infirm and unenforceable with regard to passengers who are unable to establish federal jurisdiction on the basis of diversity of citizenship. We would reverse the trial courts' orders granting dismissal and allow the cases to proceed in the circuit court.

RAMIREZ, C.J., and COPE, ROTHENBERG, and SALTER, JJ., concur.

APPENDIX B — PER CURIAM DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT DATED FEBRUARY 13, 2008

District Court of Appeal of Florida,
Third District.

No. 3D07–1009.

Feb. 13, 2008.

Laurine SPIVEY–FERGUSON,

Appellant,

v.

CARNIVAL CORPORATION, a/k/a,
Carnival Cruise Lines, Inc., a/k/a,
Carnival Tours,

Appellee.

Before GERSTEN, C.J., and RAMIREZ, and CORTINAS, JJ.

PER CURIAM.

Affirmed. *See Leslie v. Carnival Corp.*, 22 So.3d 561, 2008 WL 34793 (Fla. 3d DCA Jan.2, 2008).

ON MOTION FOR REHEARING AND CERTIFICATION

Appendix B

PER CURIAM.

We deny rehearing based on the court's en banc opinion in *Leslie v. Carnival Corporation*, No. 3D06–2228, 22 So.3d 567, 2009 WL 4061430 (Fla. 3d DCA Nov. 25, 2009). However, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), we grant the motion for certification and certify to the Supreme Court of Florida the following as a question of great public importance:

> **IS CARNIVAL'S FORUM SELECTION ENFORCEABLE IN CIRCUMSTANCES WHERE, BECAUSE OF THE JURISDICTIONAL LIMITATIONS OF FEDERAL COURTS, THE CLAUSE OPERATES TO DENY CERTAIN PLAINTIFFS, INCLUDING ALL FLORIDA CITIZENS, A RIGHT TO A JURY TRIAL IN FLORIDA WITHOUT NOTICE AND WITHOUT CONSENT TO WAIVING THIS RIGHT AS GUARANTEED UNDER ARTICLE 1, SECTION 22 OF THE FLORIDA CONSTITUTION?**

RAMIREZ, C.J., and CORTINAS, J., concur.

GERSTEN, J. (concurring in part and dissenting in part).

I concur in the denial of rehearing based upon the Court's en banc opinion in *Leslie v. Carnival Corporation*, No. 3D06–2228, 22 So.3d 567, 2009 WL

4061430 (Fla. 3d DCA Nov. 25, 2009); however, I respectfully dissent on granting certification to the Florida Supreme Court for the following reasons. First, *Leslie* clearly sets forth that basic contract law governs this matter. Additionally, I do not believe that this case presents a question of great public importance necessitating certification to our supreme court. Therefore, I respectfully concur in the denial of rehearing and dissent from the grant of certification.

APPENDIX C — PER CURIAM DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT DATED FEBRUARY 20, 2008

District Court of Appeal of Florida,
Third District.

No. 3D07–627.

Feb. 20, 2008.

Grace GARCIA,

Appellant,

v.

CARNIVAL CORPORATION, etc.,
Appellee.

PER CURIAM.

Affirmed. *See Leslie v. Carnival Corp.*, 22 So.3d 561, 2008 WL 34793 (Fla. 3d DCA Jan.2, 2008).

APPENDIX D — DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT DATED JANUARY 2, 2008

District Court of Appeal of Florida,
Third District.

Nos. 3D06–2228, 3D06–2226.

Jan. 2, 2008.

Thomas LESLIE, etc., et al.,

Appellants,

v.

CARNIVAL CORP., etc., et al.,

Appellees.

Before GREEN, SHEPHERD, and LAGOA, JJ.

SHEPHERD, J.

In these consolidated maritime personal injury actions, we must determine whether the trial court erred by enforcing a forum-selection clause in form contracts issued by Carnival Cruise Lines to Kathryn Barry and Thomas Leslie, two of its fare-paying customers, prior

to embarking on their respective Carnival cruises.[1] The clause, which undoubtedly appears in nearly all commercial passage contracts currently issued by Carnival to its fare-paying customers, directs that passenger law suits arising out of a passenger's cruise be filed exclusively in the United States District Court for the Southern District of Florida. The express language of the clause, found in Paragraph Fifteen of the Ticket Contract, reads:

> It is agreed by and between Guest and Carnival that all disputes and matters arising under, in connection with or incident to this Contract or the Guest's cruise, including travel to and from the vessel, shall be litigated, if at all, before the **United States District Court for the Southern District of Florida in Miami,** or as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami–Dade County, Florida, U.S.A. to the exclusion of the Courts of any other county, state or country.[2]

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1. These cases arrive here upon final orders of dismissal from separate complaints filed by Barry and Leslie. We review these dismissals de novo. *D'Angelo v. Fitzmaurice,* 863 So.2d 311, 314 (Fla.2003); *Lopez–Infante v. Union Cent. Life Ins. Co.,* 809 So.2d 13, 14 (Fla. 3d DCA 2002).

2. The passengers do not contest that this clause, which was referenced expressly in a bold-faced "**Important Notice to Guests**" on the first page of the Ticket Contract, was "reasonably communicated" to them as required by federal

(Cont'd)

Appendix D

Barry and Leslie are Florida residents who wish to use the courts of their own state for the resolution of negligence actions they brought against Carnival for shipboard injuries incurred during their cruises. Because of a one-year limitation period on the filing of cruise-related claims also present in Barry's and Leslie's ticket contracts, each provisionally filed identical actions in the United States District Court for the Southern District of Florida.[3] Due to a lack of diversity jurisdiction between them and Carnival, these actions are pending on the admiralty side of that court.

Barry's and Leslie's chief grievance regarding Carnival's forum-selection clause is that it strips them of their constitutional right to a jury trial, and instead affords them a jury trial in their federal forum only "with the consent of both parties." *See* Fed.R.Civ.P. 39(c).[4]

(Cont'd)

maritime law. *See Nash v. Kloster Cruise, A/S*, 901 F.2d 1565, 1567 (11th Cir.1990); *Marek v. Marpan Two, Inc.*, 817 F.2d 242, 247 (3d Cir.1987); *Carnival Corp. v. Middleton*, 941 So.2d 421, 423–24 (Fla. 3d DCA 2006) (observing that the United States District Court in a companion federal proceeding "found . . . that the ticket reasonably communicated the contractual limitations[ ]").

3. These cases have been stayed by the United States District Court pending resolution of the forum-selection clause issue presented here.

4. Federal Rule of Civil Procedure 39(c) states:

> In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue

(Cont'd)

Carnival represents in its Answer Brief here that it "has no intention of opposing Appellants[']request for a jury trial" in these passengers' pending federal actions, which Barry and Leslie suggest is further evidence of what it divines to be Carnival legerdemain. We interpret Carnival's statement to mean that if the United States District Court lifts the stays in these passengers' federal admiralty actions, Carnival will consent to a jury trial in these cases. We conclude Carnival's forum-selection clause is enforceable.

I. Carnival's Forum–Selection Clause is Prima Facie Valid and Enforceable

It is well settled that federal maritime law governs the enforceability of a forum-selection clause in a passenger cruise ticket contract. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991); *Fletcher v. Port Marine Ctr., Inc.*, No. 89–0974–N, slip op. at 1, 1990 WL 255536 (D.Mass. Aug. 7, 1990); *see also Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 766 (D.C.Cir.1992) (stating that a cruise ticket is a maritime contract and the law to be applied is general federal maritime law); *Vavoules v. Kloster Cruise, Ltd.*, 822 F.Supp. 979, 982

(Cont'd)

> with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

(E.D.N.Y.1993); *Mack v. Royal Caribbean Cruises, Ltd.*, 361 Ill.App.3d 856, 297 Ill.Dec. 593, 838 N.E.2d 80, 85 (2005).

In *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 12, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) (*The Bremen*) , the Supreme Court held that forum-selection clauses are prima facie valid and enforceable under the general maritime law. In so holding, the Supreme Court was mindful that ocean-going vessels travel through many jurisdictions, thus potentially becoming subject to the laws of a particular jurisdiction based solely upon a fortuitous event of an accident. The Supreme Court reasoned that "[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Id.* at 13–14, 92 S.Ct. 1907. To overcome the presumption that the forum-selection clause is enforceable, the Supreme Court held the party challenging the clause must make a "strong showing" that the clause is unreasonable. *Id.* at 15, 92 S.Ct. 1907.

In *Shute*, 499 U.S. at 593, 111 S.Ct. 1522 the United States Supreme Court further "refine[d] the analysis of *The Bremen* to account for the realities of **form** passage contracts." (emphasis added). In *Shute*, Eulala Shute, a resident of Washington State, suffered a shipboard injury off the coast of Mexico on a Carnival cruise she boarded in Los Angeles, California. *Id.* at 588, 111 S.Ct. 1522. Upon her return home, Shute filed suit in the United States District Court for the Western

District of Washington. A forum-selection clause in her contract of passage, a predecessor clause to the one before us, required that "all disputes . . . arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country." *Id.* at 587–88, 111 S.Ct. 1522. The Supreme Court held that a forum-selection clause in a form passenger cruise ticket contract, which was not subject to individual negotiation, nonetheless was enforceable and fundamentally fair. The *Shute* Court reasoned as follows:

> First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.

Id. at 593–94, 111 S.Ct. 1522 (citations omitted). Although the reasoning in *Shute* is not dispositive of this case, we nevertheless are of the view that if a contractual provision requiring one of Carnival's Washington State passengers to travel to Florida to litigate her shipboard personal injury claim is valid, then, *a fortiori*, it is not contractually unreasonable for Carnival to require Barry and Leslie to travel from the Miami–Dade County Circuit Court to the United States District Court for the Southern District of Florida to present their personal injury claims against Carnival in this case. In this regard, we note we have not been unduly disturbed by trial court enforcement of the identical forum-selection clause in earlier cases that have come before this Court. *See Assiff v. Carnival Corp.*, 930 So.2d 776, 778 (Fla. 3d DCA 2006) (affirming trial court order that declined to "transfer" to United States District Court an action that had been dismissed under identical forum-selection clause); *Carnival Corp. v. Middleton*, 941 So.2d 421, 423 (Fla. 3d DCA 2006) (issuing writ of prohibition quashing order of trial court, which had "re-instated" a personal injury action that previously had been dismissed on the basis of identical forum-selection clause).

II. Carnival Has Not Unlawfully "Federalized" Its Passenger Personal Injury Actions

Despite our conclusion, Barry and Leslie make a final, intriguing argument—glaringly ignored by Carnival—that neither *The Bremen* nor *Shute* afford meaningful guidance in this case, because both cases

treated "geographical" forum-selection clauses as distinguished from the clause under consideration here, which Barry and Leslie aptly characterize as a "sovereign selection clause." These passengers point out that, in substantial contrast to a "geographical" forum-selection clause, Carnival's new forum-selection clause effectively dictates not only the location where a passenger may sue, but also contractually constrains the "subject matter jurisdiction" of the available courts within that jurisdiction. According to Barry and Leslie, this constraint arises from the fact that, henceforth, all of Carnival's Florida resident passengers and its alien passengers (who all lack diversity of citizenship with Carnival) [5], and all its passengers whose claims are worth less than $75,000 (the federal diversity jurisdictional minimum), must initiate suits against Carnival on the admiralty side of the United States District Court for the Southern District of Florida, and, at the same time, all other United States citizens (for whom diversity does exist) henceforth must file on the law side of that court.

For this reason, Appellants' counsel contends, Carnival's forum-selection "creation, for proprietary use with its own particular passengers" operates henceforth

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5. *See Universal Licensing Corp. v. Paola del Lungo S.p.A.*, 293 F.3d 579, 580 (2d Cir.2002) (stating that diversity is lacking where parties on both sides are aliens, even if one is a corporation with principal place of business in the United States); *accord Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148, 1152 (5th Cir.1985). Carnival is a foreign corporation with its principal place of business in Miami-Dade County, Florida.

both: (1) to deprive its maritime passengers of their " 'historic option' and right under the Savings to Suitors Clause of 28 U.S.C. [Section] 1331(*l*) to initiate their suits in state court and to remain there unless and until properly removed by Carnival to federal district court on diversity grounds"; and (2) to disrupt the participation of this state's "trial and appellate courts as an otherwise indispensable, co-equal [an]d counterpoising source (with federal courts) of national maritime common law," contrary to the rich history of interactive relations between the states and the federal government in the field, which has existed since the United States Congress in the Judiciary Act of 1789, resolved to "save to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Judiciary Act of 1789, Ch. 20, § 9, 1 Stat. 76 (codified as amended at 28 U.S.C. § 1333(1) (2000)); *Romero v. Int'l Terminal Operating*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959), *superseded by statute on other grounds*, 45 U.S.C. § 59, *as recognized in Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990); *see also Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 445, 121 S.Ct. 993, 148 L.Ed.2d 931 (2001) (noting that the Savings to Suitors Clause originally was "inserted, probably, from abundant caution, lest the exclusive terms in which the power is conferred on the District Courts might be deemed to have taken away the concurrent remedy which had before existed" (quoting *N.J. Steam Navigation Co. v. Merchants' Bank of Boston*, 47 U.S.(6 How.) 344, 390, 12 L.Ed. 465 (1848))); *see generally* Michael D. Eriksen, *U.S. Maritime Public Policy versus Ad-Hoc Federal Forum Provisions in Cruise Tickets*, 80 Fla. B.J. 21 (2006).

Appendix D

We acknowledge the disruption to traditional maritime policy caused by Carnival's new forum-selection clause. We also are mindful that until relatively recently, forum-selection clauses, including those found in admiralty and maritime contracts, have not been favored by American courts. *See The Bremen*, 407 U.S. at 9, 92 S.Ct. 1907. As fully explained in *The Bremen*, in earlier times, "[m]any courts, federal and state, have declined to enforce such clauses on the ground they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court." *Id.*; *see also id.* at n. 10, 92 S.Ct. 1907. Thus, in former times, the outcome of this case might have been different. Today, however, we find persuasive the more recent critique by the United States Supreme Court of that earlier view, also appearing in *The Bremen*:

> The argument that such clauses are improper because they tend to "oust" a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals.

Id. at 12, 92 S.Ct. 1907.

Appendix D

Although our participation in maritime personal injury claims might be lessened by the adoption of clauses of this type, we doubt we will be silenced completely as Barry, Leslie, and their counsel so eloquently urge. Nor do we harbor jurisdictional or sovereign concern. Rather, we concur with the sentiment expressed in *The Bremen*, *id.*, that "[it] reflects something of a provincial attitude regarding the fairness of other tribunals[ ]" to suggest, as the passengers and their counsel do in the final analysis here, that plaintiffs who might become contractually obligated to appear before and litigate their cases before the fine judges of the United States District Court for the Southern District of Florida somehow will be short-changed.

Affirmed.

APPENDIX E — ORDER OF THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA DATED MARCH 28, 2007

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO. 06-15055 CA 10

LAURINE SPIVEY-FERGUSON,

Plaintiff,

vs.

CARNIVAL CORPORATION,
a/k/a, CARNIVAL CRUISE LINES, LINES, INC.,
a/k/a, CARNIVAL TOURS

Defendant.

ORDER GRANTING DEFENDANT CARNIVAL CORPORATION'S MOTION TO DISMISS

THIS CAUSE having come before this Court on March 28, 2007 upon Defendant, CARNIVAL CORPORATION'S Motion to Dismiss, and the Court having heard argument of counsel, and being otherwise fully advised in the premises, it is hereby:

Appendix E

ORDERED AND ADJUDGED: Defendant, CARNIVAL CORPORATION'S Motion to Dismiss be and the same is hereby GRANTED.

The Court finds that the forum selection clause provision requiring Plaintiff to file suit in the United States District Court for the Southern District of Florida is valid and enforceable on the authority of *Levick vs. Steiner,* Case No. 04-21910CIV-LENARD, *Middleton vs. Carnival,* Case No. 04-22176 CIV-MARTINEZ, *Gambill vs. Carnival,* Case No. 05-20163 CIV-GRAHAM, *Gambill vs. Carnival,* Case No. 04-18983 CA20, *Yarwood vs. Carnival,* Case No. 03-7818 CA08, *Zanelli vs. Carnival,* Case No. 04-25175 CA05, *Bennett vs. Carnival,* Case No. 03-28903 CA22, *Assiff vs. Carnival,* Case No. 05-03255 CA11, *Schertzer vs. Carnival,* Case No. 03-30122 CA21, *Cleveland vs. Carnival,* Case No. 05-15145 CA24, *DeJesus vs. Carnival,* Case No. 05-22482 CA05, *Jacobson vs. Carnival,* Case No. 03-30097 CA30.

The Court declines to follow Judge Friedman's Order in *Lipford vs. Carnival,* Case No. 04-09855 CA02.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 28th day of March, 2007.

/s/_____
CIRCUIT COURT JUDGE

Copies furnished to:
Paul J. Hehir, Esq.
Roderick Coleman, Esq.

APPENDIX F — ORDER OF THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA DATED FEBRUARY 16, 2007

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 06-16370 CA 05

GRACE GARCIA,

Plaintiff,

vs.

CARNIVAL CORPORATION, A foreign corporation, d/b/a CARNIVAL CRUISE LINES,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR FINAL SUMMARY JUDGMENT

This Cause came before the Court for hearing on February 7, 2007 on Defendant, CARNIVAL

Appendix F

CORPORATION d/b/a CARNIVAL CRUISE LINES', Motion to Dismiss or in the Alternative for Final Summary Judgment, and after hearing argument of counsel, reviewing the pleadings, and being otherwise fully advised in its premise, it is hereby

ORDERED that the Defendant's Motion is hereby **GRANTED** with prejudice.

DONE AND ORDERED in Chambers at Miami, Miami-Dade County, Florida, this 16th day of February, 2007.

/s/_____
CIRCUIT COURT JUDGE

Copies furnished to:
Donnise A. DeSouza, Esq.
David Sampedro, Esq.

APPENDIX G — ORDER OF THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA DATED AUGUST 18, 2006

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

CASE NO.: 05-12509 CA 04

THOMAS W. LESLIE,

Plaintiff,

v.

CARNIVAL CORPORATION, a
Panamanian corporation d/b/a
"CARNIVAL CRUISE LINE" and/or
"CARNIVAL,"

Defendant.

ORDER DENYING PLANTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION TO DISMISS

Appendix G

This **CAUSE** came before the Court upon the Plaintiff's Motion for Partial Summary Judgment and upon the Defendant's Motion to Dismiss. The Court having reviewed the memoranda and other submissions of the parties, and having heard argument, it is hereby

ORDERED and ADJUDGED that Plaintiff's Motion for Partial Summary Judgment be, and the same is hereby, **DENIED.**

Defendant's Motion to Dismiss is GRANTED.

DONE, and ORDERED in Chambers at Miami-Dade County, Florida this 18th Day of August, 2006.

/s/_____
GERALD D. HUBBART
CIRCUIT JUDGE

Copies furnished:
Counsel of Record

APPENDIX H — ORDER OF THE SUPREME COURT OF FLORIDA DATED AUGUST 30, 2010

SUPREME COURT OF FLORIDA
MONDAY, AUGUST 30, 2010

CASE NOS.: SC09-2408, SC09-2409,
SC09-2410, SC09-2411

Lower Tribunal No(s).: 3D06-2228,
3D06-2226,
3D07-627,
3D07-1009,
05-12509,
05-18925,
06-15055,
06-16370

THOMAS LESLIE vs.	CARNIVAL CORPORATION, ETC.
KATHRYN BARRY vs.	CARNIVAL CORPORATION, ETC.
GRACE GARCIA vs.	CARNIVAL CORPORATION, ETC.
LAURINE SPIVEY-FERGUSON vs.	CARNIVAL CORPORATION, ETC.
Petitioner(s)	Respondent(s)

Appendix H

These causes having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petitions for review are denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

CANADY, C.J., and QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

A True Copy
Test:

/s/_____
Thomas D. Hall
Clerk Supreme Court

No. 10-715

IN THE

Supreme Court of the United States

THOMAS LESLIE, LAURINE SPIVEY-FERGUSON, AND GRACE GARCIA,
Petitioners,

v.

CARVINAL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

BRIEF IN OPPOSITION

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February 2, 2011

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Savings to Suitors Clause or 46 U.S.C. § 30509 abrogates the presumed validity of a federal forum-selection clause in a cruise passenger ticket contract?

2. Whether the presumed validity of a forum-selection clause in a passenger ticket contract applies where the designated forum is a federal court, resulting in a waiver of a state court forum and, to those falling only within the admiralty jurisdiction of the court, a potential waiver of their right to a jury trial?

CORPORATE DISCLOSURE STATEMENT

Respondent/Appellee "Carnival Corporation, d/b/a Carnival Cruise Lines, Inc." refers to itself as "Respondent" or "Carnival". Respondent refers to Petitioners/Appellants as "Petitioner(s)" or by their surnames. Respondent cites to Petitioners' "Petition for a Writ of Certiorari" as "*Pet. Brief* at ___".

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IN THE

Supreme Court of the United States

No. 10-715

THOMAS LESLIE, LAURINE SPIVEY-FERGUSON, AND GRACE GARCIA,
Petitioners,

v.

CARVINAL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners[1] filed their claims in the Eleventh Judicial Circuit Court of Florida[2], alleging they suffered personal injuries while traveling as passengers

[1] Petitioners Thomas Leslie and Kathryn Barry also filed suit in the United States District Court for the Southern District of Florida to preserve their claims from being time-barred in the event their state court actions were dismissed. Petitioner Kathrin Barry ultimately litigated her action in federal court without a jury, received a $869,543.19 award, and does not join Petitioners in this writ. *Barry v. Carnival Corp.*, No. 05-22549 (S.D. Fla. July 16, 2010).

[2] Florida Circuit Courts are the trial courts of original jurisdiction for most controversies. *See generally* FLA. STAT. § 26.012 (2010).

aboard Carnival cruise ships. Their claims are subject to passenger ticket contracts, all of which contain a forum-selection clause requiring that they bring suit, if at all, in the United States District Court for the Southern District Court of Florida. The pertinent language of the forum-selection clause provides as follows:

> 15. It is agreed by and between Guest and Carnival that all disputes and matters arising under, in connection with or incident to this Contract or the Guest's cruise, including travel to and from the vessel, shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, or as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami-Dade County, Florida, U.S.A. to the exclusion of the Courts of any other county, state, or country.

The trial court enforced the forum-selection clause and dismissed the state court actions. Petitioners appealed to Florida's Third District Court of Appeal[3] (hereinafter "Third District"), challenging the validity of the forum-selection clause, contending that it violates the Savings to Suitors Clause, 28 U.S.C. § 1331(1), by preventing them from bringing their

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[3] Article V, section 1 of the Florida Constitution requires the Florida legislature to establish judicial circuits and appellate districts throughout the state. According to this constitutional mandate, the legislature has divided the state into twenty judicial circuits, created and defined in FLA. STAT. § 26.021 (2010), and five appellate districts, established by FLA. STAT. § 35.01 (2010). Each appellate district is comprised of a group of contiguous judicial circuits subject to the jurisdiction of a single district court of appeal.

suits in state court, and that – for those passengers subject only to the district court's admiralty jurisdiction – it results in a *sub silentio* waiver of their right to a trial by jury. The Third District upheld the validity of the clause. *See Leslie v. Carnival Corp.*, 22 So. 3d 561 (Fla. 3d DCA 2008) (termed "*Leslie I*" by Petitioners). Based on *Leslie I*, the Third District issued *per curiam* affirmances in *Garcia v. Carnival Corp.*, 22 So. 3d 567 (Fla. 3d DCA 2008) and *Spivey-Ferguson v. Carnival Corp.*, 22 So. 3d 566 (Fla. 3d DCA 2008). Thereafter, the Third District consolidated all four cases for purposes of rehearing *en banc*, which resulted in no decision due to an even split in the court and left the opinion in *Leslie I* standing. *See Leslie v. Carnival Corp.*, 22 So. 3d 567 (3d DCA 2009) (termed "*Leslie II*" by Petitioners). Concurrently, in *Spivey-Ferguson*, 22 So. 3d 566 (Fla. 3d DCA 2008), *rehearing denied and question certified* 22 So. 3d 567 (Fla. 3d DCA 2009), the Third District certified a question of great public importance to the Florida Supreme Court. In *Garcia v. Carnival Corp.*, No. 3D07-627 (Fla. 3d DCA Apr. 13, 2010) (order denying motion for certification), the Third District declined Petitioner Garcia's request to certify a question of great public importance to the Florida Supreme Court.

Petitioners sought consolidated review before the Florida Supreme Court. That Court declined to exercise its jurisdiction. *Leslie v. Carnival Corp.*, 44 So. 3d 1178 (Fla. Aug. 30, 2010). Petitioners now seek consolidated review before this Court.

ARGUMENT

I. PETITIONERS PRESENT NO COMPELLING REASON FOR REVIEW BY THIS COURT.

Petitioners neglect to specify the grounds upon which they seek this Court's jurisdiction. Petitioners do not present an "important" question of federal law that "should be" decided by this Court. S. Ct. R. 10(c). Nor do they assert conflict between opinions of state courts of last resort, United States courts of appeal, or with this Court. S. Ct. R. 10(b). Rather, they challenge the Third District's application of this Court's precedent that repeatedly enforces contractual forum-selection clauses and challenge the Third District's finding that the forum-selection clause does not violate its state's public policy. This challenge of purported misapplication of law does not warrant this Court's review. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of...the misapplication of a properly stated rule of law.")

A. The Third District's opinion is consistent with well-settled federal law that supports the enforcement of maritime forum-selection clauses.

The Third District, in its opinion below, followed two decisions from this Court, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("The Bremen") and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), in enforcing the validity of Carnival's forum-selection clause. In *The Bremen*, this Court "held that forum-selection clauses are prima facie valid and enforceable under the general maritime law." *Leslie I*, 22 So.3d at 563. It reasoned that ocean-faring

vessels travel through many different jurisdictions, thus potentially becoming subject to the laws of a particular jurisdiction by chance or accident, such that "[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *The Bremen*, 407 U.S. at 13-14.

The Third District followed this Court's reasoning, writing that "[t]o overcome the presumption that the forum-selection clause is enforceable, ... the party challenging the clause must make a 'strong showing' that the clause is unreasonable." *Leslie I,* 22 So.3d at 563. [internal citations omitted]. It found that Petitioners failed to make this "strong showing". *Id.* at 565-66. To the extent that Petitioners seek to instead shift the burden of presumption by requiring Carnival to prove the reasonableness of the clause, such argument inverts long-standing case law that presumes the validity of a forum-selection clause. *See The Bremen*, 407 U.S. 1; *Shute*, 499 U.S. 585; *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

Petitioners urge this Court's review on argument that the Third District misapplied *The Bremen* when it overlooked the "other language" that a forum-selection clause should be held unenforceable if enforcement would contravene a strong public policy in the forum in which suit is brought. This contention is not appropriate for this Court's certiorari review, because it invites this Court to assume the awkward role of reviewing a state court's finding that Carnival's forum-selection clause does

not violate that state's public policy.[4] In any event, the Third District correctly applied this Court's analysis in *The Bremen* to uphold the validity of Carnival's forum-selection clause:

> The argument that such clauses are improper because they tend to "oust" a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals.

Id. at 565 (quoting *The Bremen*, 407 U.S. at 12.)

To create an issue, Petitioners misconstrue the Third District's analysis of *The Bremen* by faulting the court for having "expressly acknowledge[d] the disruption to traditional maritime policy caused by Carnival's new forum selection clause," and "enforc[ing] it anyway." *Pet. Brief* at 12. This argument misconstrues the Third District's statement, which focused not on a sudden disruption to maritime law, but rather on the shift away from antiquated apprehen-

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[4] Petitioner Leslie, along with Ms. Barry, brought an action for declaratory relief in a second forum, the U.S. District Court for the Southern District of Florida, seeking a declaration holding the forum-selection clause invalid. District Judge Moore declined to grant the requested relief for lack of standing. *Barry v. Carnival Corp.*, No. 05-22551, 424 F. Supp. 2d 1354, 1357 (S.D. Fla. Mar. 29, 2006). That ruling was upheld on appeal. *Barry v. Carnival Corp.*, Nos. 06-12615, 06-13006, 257 Fed. Appx. 224 (11th Cir. Dec. 04, 2007).

sion toward enforcement of forum-selection clauses. *Leslie I,* 22 So.3d at 565.

By their ticket contracts, Petitioners agreed to submit their claims to a particular forum. This type of agreement is enforceable under *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). In *Shute*, this Court further "refine[d] the analysis of *The Bremen* to account for the realities of a form passage ticket contract," and held that a forum-selection clause in a form passenger cruise ticket contract, which was not subject to individual negotiation, was nonetheless enforceable and fundamentally fair. *Leslie I,* 22 So.3d at 563. The Third District followed *Shute* when it enforced as reasonable Petitioners' agreement to file their suits in federal district court:

> Although the reasoning in *Shute* is not dispositive of this case, we nevertheless are of the view that if a contractual provision requiring one of Carnival's Washington State passengers to travel to Florida to litigate her shipboard personal injury claim is valid, then, *a fortiori,* it is not contractually unreasonable for Carnival to require Barry and Leslie to travel from the Miami-Dade County Circuit Court to the United States District Court for the Southern District of Florida to present their personal injury claims against Carnival in this case.

Leslie I, 22 So.3d at 564.

Petitioners attempt to distinguish the forum-selection clause in *Shute* from the one here by arguing that the former is only a standard geographical forum-selection clause, while the latter is a *sovereign*-selection clause, which they contend deprives certain maritime passengers of their "historic option"

and right under the Savings to Suitors clause, 28 U.S.C. § 1331, to initiate their suits in state court and to remain there. That argument fails to account for the simple explanation that Petitioners chose not to pursue their right to initiate their actions in state court when they agreed to bring suit in the federal forum.

The Third District correctly analyzed the Savings to Suitors clause as reserving "to suitors the right of a common law remedy in all cases where the common law is competent to give it." *Leslie I,* 22 So.3d at 565 (citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), *superseded by statute on other grounds,* 45 U.S.C. § 59, *as recognized in Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)). It "does no more than preserve the rights of maritime suitors to pursue nonmaritime remedies." *Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063, 1066 (5th Cir. 1981). It saves to suitors only a common law remedy; it does not guarantee the litigant a non-federal forum. *See id.* at 1066. The Savings to Suitors clause has long been construed to afford litigants a choice of remedies, not forums, and "it is not a remedy in the common-law courts which is saved, but a common-law remedy." *The Moses Taylor*, 71 U.S. 411, 431 (1866). In the *Leslie I* opinion, the Third District correctly analyzed the Savings to Suitors clause within its historic context and as interpreted by this Court in *Lewis v. Lewis & Clark Marine, Inc.* 531 U.S. 438, 445 (2001) (noting that the Savings to Suitors Clause originally "was inserted, probably, from abundant caution, lest the exclusive terms in which the power is conferred on the District Courts might be deemed to have taken away the concurrent remedy which had before existed" (quoting *N.J. Steam Navigation Co. v. Merchants' Bank of Boston,* 47 U.S. 344 (1848))).

Petitioners argue that the contractual forum-selection clause improperly federalizes maritime personal injury actions brought by passengers, but the state court below correctly rejected this argument; rather than destroying concurrent jurisdiction between state and federal courts for maritime personal injury claims in contravention to the Savings to Suitors clause, the forum-selection clause simply designates one of two potential forums, both of which would indeed otherwise have subject-matter jurisdiction in the absence of the contract. In effect, Petitioners' reasoning wrongly suggests that where there is concurrent jurisdiction, there should be a federal "public policy" prohibiting private parties who deal at arms-length from contractually agreeing to select a forum for dispute resolution.

Moreover, *Shute* undermines Petitioners' contention that the federal forum-selection clause violates 46 U.S.C. § 183(c) [recodified in 2006 under 46 U.S.C. § 30509][5], the Limitation of Vessel Owner's Liability Act:

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[5] 46 U.S.C.A. § 30509 provides, in relevant part, as follows:

> **(a) Prohibition.—**
>
> **(1) In general.**—The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting—
>
> **(A)** the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or
>
> **(B)** the right of a claimant for personal injury or death to a trial by court of competent jurisdiction.

> By its plain language, the forum-selection clause before us does not take away respondents' right to "a trial by [a] court of competent jurisdiction" and thereby contravene the explicit proscription of § 183c. Instead, the clause states specifically that actions arising out of the passage contract shall be brought "if at all," in a court "located in the State of Florida," which, plainly, is a "court of competent jurisdiction" within the meaning of the statute.

499 U.S. at 596. ("Because the clause before us allows for judicial resolution of claims against [Carnival] and does not purport to limit [Carnival's] liability for negligence, it does not violate 183c."). Nor does the Congressional testimony of Adele Springer, Esq., upon which Petitioners rely, support their contention that the federal forum-selection clause violates the public policy expressed in 46 U.S.C. § 30509. After all, "[i]t is only when passengers choose to bring their actions in admiralty that no right exists to trial by jury." Safety of Life and Property at Sea: Hearings before the House Committee on Merchant Marine and Fisheries: 74th Cong., 2nd Sess., pt. 4, pp. 109-110 (1936). Petitioners had that choice and by agreement chose to litigate, if at all, in federal district court.

Further, this Court should not grant review based on Petitioners' challenge that the forum-selection clause is unreasonable *per se* because it purportedly *sub silentio* waives the right of non-diversity suitors to a jury trial. Petitioners argue that the forum clause is unenforceable because it deprives non-diversity

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> **(2) Voidness.**—A provision described in paragraph (1) is void.

plaintiffs of their constitutional right to a jury trial without notice and without consent. However, the issue before this Court is not one regarding the validity of a jury trial waiver. Instead, it is the validity of a forum-selection clause that may result – depending on the residency of the passenger and amount in controversy – in the indirect loss of a jury trial by virtue of the procedures employed in an action brought under the admiralty jurisdiction of a district court. *See Waring v. Clarke*, 46 U.S. 441, 460 (1847) ("[W]e cannot see how [admiralty and maritime trials] are to be embraced in the [S]eventh [A]mendment of the [C]onstitution[.]"); *Curtis v. Loether*, 415 U.S. 189, 193 (1974) ("[T]he [Seventh] [A]mendment [should] be construed to embrace all suits which are not of equity and admiralty jurisdiction [.]")[6] Indeed, other types of clauses, which also incidentally surrender the right to jury trial, are routinely upheld. *See IFC Credit Corp. v. United Business & Indus. Federal Credit Union*, 512 F.3d 989 (7th Cir. 2008) (declining to follow decisions of the Second and Sixth Circuits that have held that agreements to resolve disputes by bench trials are enforceable only if extra evidence of negotiation or consent supports that clause). As articulated by the United States Court of Appeals for the Seventh Circuit,

> Consider an agreement to arbitrate, which surrenders not only a jury trial but also the right

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[6] Moreover, as it turned out, and as was recognized in *Leslie II*, Carnival consented to a jury trial pursuant to Rule 39(c). Plaintiff Barry waived an offered advisory jury trial anyway and proceeded with a bench trial. Petitioner Leslie's claim is still proceeding in U.S. district court. *See Leslie v. Carnival Corp.*, Case No. 05-22550 (S.D. Fla.).

> to any judicial forum. Courts do not impose special negotiation requirements on arbitration clauses in form contracts... So too with forum-selection clauses; parties may agree to a forum in another nation, where juries are unknown, but this does not make forum-selection clauses suspect. Even confession-of-judgment clauses in cognovit notes are enforceable...Agreement to a bench trial cannot logically be treated less favorably than agreement to confess judgment, or arbitrate, or litigate in a forum that will not use a jury. Many courts accordingly hold that an agreement to resolve a dispute in a bench trial is no less valid than the rest of the contract in which the clause appears."

Id. at 994. Furthermore, despite the care and protections afforded seamen due to their status as "the wards of admiralty," *see Atlantic Sounding Co., Inc. v. Townsend*, 129 S. Ct. 2561, 2570 (2009) and *Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO et. al. v. Mobil Oil Corp.*, 426 U.S. 407 (1976) (Powell, J., concurring), agreements to arbitrate, even in foreign lands, are regularly upheld in seamen's employment contracts. *See Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005); *Balen v. Holland America Line Inc.*, 583 F.3d 647 (9th Cir. 2009); *see also Rogers v. Star Cruises*, 547 F.3d 1148 (9th Cir. 2008); *Lobo v. Celebrity Cruises, Inc.*, 488 F.3d 891 (11th Cir. 2007); *Francisco v. STOLT ACHIEVEMENT MT*, 293 F.3d 270 (5th Cir. 2002). Moreover, outside the scope of admiralty law, precisely which specific factual determinations are triable by jury and under which circumstances often varies across state lines as well as between federal and state procedural rules. *See Georgia v. McCollum*, 505 U.S. 42 (1992) (citing *Minneapolis & St. Louis R.*

Co. v. Bombolis, 241 U.S. 211 (1916) for the proposition that "[s]tates do not have a constitutional obligation to provide a jury trial in civil cases"); *see also Stephen Landsman, The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L. J. 579 (1993); Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L. J. 655 (1963). It is therefore not a stretch to conclude that forum-selection clauses collaterally resulting in a loss of access to a jury in certain circumstances are routinely upheld without the requirement that a jury waiver be knowing and voluntary. Accordingly, Petitioners' strained argument that a forum-selection clause which operates to deprive cruise passengers of a jury trial in a narrow set of circumstances *only* if they knowingly and voluntarily waive a jury trial does not merit this Court's review.

B. Petitioners fail to show conflict with another state court of last resort, court of appeals, or for that matter, this Court.

Petitioners invite this Court to intervene and review the decisions below, lest the Savings to Suitors clause and "other applicable federal maritime law...be left up to parochial and conflicting decision-making by state courts only..." *Pet. Brief* at 32. Petitioners insinuate conflict by comparing *Leslie I* and *Oltman v. Holland America Line – USA*, 178 P.3d 981 (Wash. 2008) (Savings to Suitors clause confers no right to state court access) with *Nunez v. American Seafoods*, 52 P.3d 720 (Alaska 2002). *Nunez*, however, did not involve a forum-selection clause in a maritime *passenger ticket contract* such as the one here or in *Shute*. Instead, *Nunez* involved a forum-selection clause in a *seamen's employment contract*.

52 P.3d at 721. There, the Supreme Court of Alaska declined to enforce the federal forum-selection clause because the seaman plaintiff brought a Jones Act claim, which some courts have interpreted as incorporating provisions of the Federal Employer's Liability Act (FELA). The court in *Nunez* relied on *Boyd v. Grand Trunk Western Railroad Co.*, 338 U.S. 263 (1949)[7], in which this Court "expressly interpreted section 5 of the FELA to declare void any contract provision within the Act's coverage that limit's *an employee's* 'right to bring suit in any eligible forum.'" *Nunez*, 52 P.3d at 720. The Supreme Court of Alaska distinguished the rights conferred by the Jones Act in combination with the Savings to Suitors clause from those conferred by general maritime law and found *The Bremen* and *Shute* less instructive there. *Id.* at 721.

Oltman v. Holland America Line USA, Inc., 178 P.3d 981 (Wash. 2008), on the other hand, *did* involve a federal forum-selection clause in a passenger ticket contract, and the court there, like the Third District below, rejected the Savings to Suitors clause-based challenge. *See id.* at 994 ("While the savings to suitors clause allows for concurrent state and federal jurisdiction over admiralty matters, the Oltmans cite no authority that supports their claim that they were entitled to file in state court under the savings to suitors clause despite the forum-selection clause in the cruise contract. The forum-selection clause required them to file in federal court in the first

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[7] Petitioners also cite to *Boyd*, arguing that this Court's reasoning in that case requires the federal forum-selection clause here to be found void. Petitioners fail to explain why this Court's analysis in a decision that relied on the statutory forum eligibility provision in FELA is relevant here.

instance.") The same reasoning applies here. Nothing in the Savings to Suitors clause prevents parties from preemptively agreeing to a specified forum.

Petitioners overstate the purported conflict among state-level decisions that have determined the enforceability of a federal forum-selection clause in a maritime passenger ticket. In fact, *Oltman*, the only other state supreme court decision cited by Petitioners that actually involves a forum clause in a passenger ticket contract, resolved the issue in alignment with the Florida state court below. *Oltman*, 178 P.3d at 994.

Thus, there is no conflict between the opinion below and federal law, including precedent from this Court, or the decisions of other state courts of last resort. Accordingly, this Court should decline review of the decisions below.

II. *LESLIE* WAS DISMISSED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

This Court has long held that it will not consider an issue of federal law on direct review from a judgment of a state court if the state court's judgment rests on a state-law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision. *See Lambrix v. Singletary*, 520 U.S. 518 (1997); *Bell v. State of Md.*, 378 U.S. 226 (1964). This Court's power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights; the power is to correct wrong judgments, not to revise opinions taking erroneous views of federal law. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). Where a state court decision rests upon an

adequate and independent state ground, the state ground controls the result in the case, no matter what this Court may say about the merits of the federal issue. *Id.* In such a case, anything which this Court could say on the federal issue would merely be an advisory opinion, and this Court has oft stated that it does not have jurisdiction to render an advisory opinion under such circumstances, *see Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100 (1973), or to correct statements in state court opinions which do not affect the final outcome of a case, *see Black v. Cutter Laboratories*, 351 U.S. 120 (1945), even though a state court's opinion may reflect an erroneous view of federal law. *See Radio Station WOW v. Johnson*, 326 U.S. 120 (1945).

Here, although the Third District relied primarily on federal general maritime law for its analysis, its holding affirmed a state court decision that declined subject-matter jurisdiction in deference to a contractual forum-selection clause. Petitioners' reliance on *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 363, 370-71 (1959) ("Except in diversity cases, maritime litigation brought in state courts [cannot] be removed to the federal courts" because "making maritime cases removable to the federal courts...would make considerable inroads into the traditionally exercised concurrent jurisdiction of state courts in admiralty matters...a jurisdiction which it was the unquestioned aim of the saving clause of 1789 to preserve") is therefore misplaced. Unlike in *Romero*, the facts of this case do not involve a removal pursuant to 28 USC § 1441. Rather, the state court simply declined to hear the case on subject-matter jurisdiction grounds due to an agreed-to forum-selection clause. This distinction was recognized in *Assiff v. Carnival Corp.*, 930 So.2d 776

(Fla. 3d DCA 2006), another Florida case that upheld the very same forum-selection clause at issue. In *Assiff*, the Third District disagreed that removability was relevant:

> 28 U.S.C. § 1441 allows for the removal of a case from a state court to a federal court under specific circumstances, which we find are not present in this case...since there is no statutory mechanism to remove or transfer this matter to federal court, the trial court properly dismissed the complaint.

Id. at 778. The Third District in this case explicitly noted that its decision to uphold the contractual forum-selection clause was reinforced by its earlier decisions in *Assiff* as well as *Carnival Corp. v. Middleton*, 941 So. 2d 421 (Fla. 3d DCA 2006). This Court should not interfere with the state court's dismissal of a case brought before it in contravention to a forum-selection clause that properly designated the U.S. District Court, a court with concurrent jurisdiction, as the exclusive forum. Notwithstanding Petitioners' pleas that "*somewhere*, there has to be a public policy force field that such clauses may not cross" (emphasis in original), as the Third District correctly objected, "it is oxymoronic under our federal system of government to think that the United States Congress has the power to command a state court to exercise its jurisdiction to do anything." *Leslie II*, 22 So. 3d 567 (Shepherd, J., concurring); *see also Howlett By and Through Howlett v. Rose*, 496 U.S. 356 (1990); *Herb v. Pitcairn*, 324 U.S. 117 (1945). This is particularly true where Petitioners have failed to exhaust their remedies in federal court, where Petitioner Leslie's action remains pending.

CONCLUSION

Petitioners have offered no compelling reasons why this Court should take up this case. The court below faithfully adhered to well established federal case law and the overwhelming federal policy that favors the enforcement of maritime forum-selection clauses. The Third District opinion is consistent with those rendered by this and other federal courts as well as other state courts of last resort. Further, the Third District opinion below rests upon adequate and independent state grounds. Therefore, Petitioners have offered no convincing reason – and there is no convincing reason – for this Court to grant their Petition.

WHEREFORE, Respondent, Carnival Corporation, respectfully requests that Petitioners' request for a writ of certiorari be denied.

Respectfully submitted,

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